SUPREME COURT, U. S.

MAR 13 1968

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1225

ROADWAY EXPRESS, INC.,

Appellant,

vs.

DIRECTOR, DIVISION OF TAXATION,

Appellee.

On Appeal from the New Jersey Supreme Court

JURISDICTIONAL STATEMENT

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IN THE

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No.

ROADWAY EXPRESS, INC.,

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vs.

DIRECTOR, DIVISION OF TAXATION,

Appellee.

JURISDICTIONAL STATEMENT

The appellant, pursuant to United States Supreme Court Rules 13(2) and 15, files this statement of the basis upon which it contends (1) that the United States Supreme Court has jurisdiction on direct appeal to review the final judgment of the New Jersey Supreme Court, entered December 18, 1967, affirming the judgment of the State Division of Tax Appeals, that as applied to the appellant, which is engaged exclusively in interstate commerce, the imposition of the New Jersey Franchise Tax did not violate the Commerce Clause of the United States Constitution, and (2) that it should exercise that jurisdiction in this case.

Opinions Below

The opinion of the New Jersey Supreme Court of this action is officially reported at 50 N. J. 471, and unofficially reported at 236 A. 2d 577. Copies of the opinion and judgment of that court are attached hereto as Appendix A and Appendix B, respectively. A copy of the opinion of the State Division of Tax Appeals, dated December 20, 1965, which has not been reported, is attached hereto as Appendix C.

Jurisdiction

(i) The Director, Division of Taxation of the Treasury Department of the State of New Jersey, entered a determination on August 29, 1962, that appellant was liable for franchise taxes for the years 1946 to 1960 inclusive, pursuant to the Corporation Business Tax Act (1945), L. 1945, c. 162, p. 563; N.J.S.A. 54:10A-1, *et seq.* In accordance with the provisions of N.J.S.A. 54:10A-19.2 appellant filed a petition of appeal from that determination with the Division of Tax Appeals, asserting that appellant's activities in New Jersey had been exclusively in interstate commerce and that by virtue of the Commerce Clause of the United States Constitution, Art. I, §8, Cl. 3, the State of New Jersey had no power to impose the said tax upon appellant. A copy of said petition of appeal is attached hereto as Appendix D. The State Division of Tax Appeals affirmed the determination of the Director, and its decision was, in turn, affirmed by the New Jersey Supreme Court.

(ii) The judgment of the New Jersey Supreme Court which is sought to be reviewed, is dated and was entered on December 18, 1967. Notice of appeal was filed by appellant in the New Jersey Supreme Court on February 19, 1968.

(iii) The jurisdiction of the United States Supreme Court to review the decision and judgment of the New Jersey Supreme Court is conferred by 28 U.S.C. §1257, which reads:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

(iv) Cases which sustain the jurisdiction of this court to entertain an appeal under the quoted statute are as follows:

Charleston Federal Savings & Loan Ass'n v. *Alderson*, 324 U. S. 182, 185 (1945);

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U. S. 157 (1954);

Railway Express Agency, Inc. v. *Virginia*, 347 U. S. 359 (1954);

Werner Machine Co. v. *Director of Taxation*, 350 U. S. 492 (1956);

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U. S. 753 (1967);

Loving v. *Virginia*, 388 U. S. 1 (1967).

Also, this court has recently noted probable jurisdiction in two other cases when the state court upheld state legislation that had been challenged as invalid under the Federal Constitution:

Interstate Circuit v. *City of Dallas*, 387 U. S. 903 (1967); opinion below 402 S. W. 2d 770;

Norfolk & Western Ry. v. *Missouri State Tax Comm.*, 389 U. S. 810 (1967); issues summarized 36 U. S. L. W. 3056.

The case at bar falls squarely within 28 U.S.C. §1257.

(v) Appellant contends in this proceeding that the New Jersey Corporation Business Tax Act, L. 1945, c. 162, p. 563; N.J.S.A. 54:10A-1, *et seq.* is invalid and unconstitutional as applied to a foreign corporation whose activities in New Jersey are limited exclusively to interstate commerce. No questions as to the amount of the tax, or the calculation thereof, are involved on this appeal. The only relevant section of the statute is believed to be N.J.S.A. 54:10A-2, which provides:

> "54:10A-2. *Franchise tax, annual payment in lieu of taxes upon intangible personal property; 'doing business in state' defined*
>
> "Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual franchise tax for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act.
>
> "A foreign corporation shall not be deemed to be doing business, employing or owning capital or

property in the State, for the purposes of this act, by reason of (1) the maintenance of cash balances with banks or trust companies in this State, or (2) the ownership of shares of stock or securities in this State if such shares or securities are pledged as collateral security, or deposited with one or more banks or trust companies or brokers who are members of a recognized security exchange, in safekeeping or custody accounts, or (3) the taking of any action by any such bank or trust company or broker, which is incidental to the rendering of safekeeping or custodian service to such corporation. L. 1945, c. 162, p. 563, §2."

Questions Involved

Appellant being a foreign corporation whose activities in New Jersey are limited exclusively to interstate commerce:

A. Is the tax imposed by N.J.S.A. 54:10A-2 in its operating incidence an excise tax on the franchise of appellant to do business in New Jersey?

B. Under the Commerce Clause of the United States Constitution, Art. 1, §8, I. 3, does New Jersey have the constitutional power to impose a franchise tax under N.J.S.A. 54:10A-2 upon appellant?

Statement of the Case

There is no dispute as to the facts. A stipulation of facts was filed with the State Division of Tax Appeals (Appendix, E). The facts are fairly summarized in the opinion of the New Jersey Supreme Court (50 N. J. 477-481; 236 A. 2d 580-582; *infra* pp. 6a-10a). Suffice it to say for present purposes that appellant is a Delaware corporation having its home office in Akron, Ohio; that it is a com-

mon carrier of general freight by motor vehicle, operating pursuant to certificates of convenience and necessity issued by the Interstate Commerce Commission; that it has never been authorized, or made application to be authorized, by New Jersey to do business in that State; that all of the freight carried by appellant within the State of New Jersey moves in interstate commerce, none of it having both a point of origin and a destination within the State of New Jersey; that maintenance and operation of terminals and a sales force in New Jersey were, as stated by the New Jersey Supreme Court, "so intimately connected with the exclusively interstate freight business that, under current law, they are not to be classified separately as intrastate in character for state taxation purposes" (50 N. J. 480; 236 A. 2d 582; *infra* p. 10a).

The Federal question of the unconstitutionality under the Commerce Clause of the imposition of the corporation business tax upon appellant was raised in the petition of appeal from the determination of the Director of the Division of Taxation to the State Division of Tax Appeals (App. D, p. 48a).*

* Believing, as was borne out by subsequent developments, that there were no disputed facts and that the only issue was the question of the constitutionality of the imposition of the tax, appellant, even prior to filing its petition of appeal to the State Division of Tax Appeals, filed an action in the New Jersey Superior Court seeking relief in lieu of prerogative writ and for a declaratory judgment that the tax statute was unconstitutional as applied to appellant. The New Jersey Supreme Court affirmed the dismissal of the complaint on the ground of plaintiff's failure to exhaust its administrative remedy, *Roadway Express* v. *Kingsley*, 37 N. J. 136, 179 A. 2d 729 (1962). The issue of constitutionality is stated in that opinion at 37 N. J. 138 and 140, 179 A. 2d 730 and 731. See statement in opinion below, 50 N. J. 475; 236 A. 2d 579; *infra* pp. 3a-4a.

The Federal Questions are Substantial

The issues raised on this appeal involve not only the proper meaning and effect of the Commerce Clause, but also the vitality and applicability of a prior decision of this Court, *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951).

The New Jersey Supreme Court, in the able opinion below, recognized and accepted the doctrine illustrated by *Spector* that a franchise tax on a foreign corporation engaged exclusively in interstate commerce, and levied solely on the privilege of doing such business in the state, is constitutionally forbidden under the Commerce Clause (see 50 N. J. 492, 236 A. 2d 588; *infra* p. 23a). The Court sought to escape the application of this doctrine (1) by viewing the New Jersey tax as being imposed upon something more than the privilege of doing business, attempting to distinguish the taxing statute in *Spector* from the one here involved, and (2) by hypothesizing in any event that this Court would no longer follow *Spector*. Appellant challenges both propositions.

The legal issues are sharply presented, since the Court below held that appellant's activities in New Jersey were to be considered as being exclusively in interstate commerce (50 N. J. 480; 236 A. 2d 582; *infra* p. 10a); that the Spector Company "conducted an exclusively interstate trucking business in Connecticut in a manner not significantly different from Roadway" (50 N. J. 486; 236 A. 2d 585; *infra* p. 16a);* and that the New Jersey tax "is a fran-

* Compare the facts at bar (50 N. J. 477-481; 236 A. 2d 580-582, *infra* pp. 6a-10a) with those in *Spector* as stated in *Spector Motor Service* v. *Walsh*, 135 Conn. 37, 61 A. 2d 89 at 93 (1948), and by this Court in 340 U. S. 602 at 606-607.

chise, i.e. a privilege, impost'' (50 N. J. 481; 236 A. 2d 582, *infra* p. 11a). Moreover, appellant did not challenge below and does not challenge here, the validity or propriety of the apportionment formula for calculating the tax under either the due process clause or the equal protection of the laws clause of the Federal Constitution, so considerations of those kinds do not enter into the case at bar.

1. Does New Jersey tax the privilege of doing business or something more?

Appellant contends that the New Jersey tax, in substance—in its operating incidence—is imposed simply on its privilege of doing business, and that in essence the tax is indistinguishable from the Connecticut tax involved in *Spector*. The Court below ruled otherwise, holding that the New Jersey tax is imposed on certain privileges in addition to that of doing business, namely, the privilege of employing or owning capital or property, or maintaining an office in New Jersey, and the privilege of exercising its corporate franchise in the State (50 N. J. 492; 236 A. 2nd 588, *infra* pp. 23a-24a). Appellant says that all of these privileges viewed realistically are paraphrases and mean nothing more than the privilege of doing business, and that it is significant that they are all listed in the statute, N.J.S.A. 54:10A-2 under the heading "'doing business in state' defined". Apparently, the New Jersey legislature, like appellant, believed that these privileges are all comprehended within that of "doing business".

Notwithstanding this ruling of the New Jersey Supreme Court, it is open to this Court to determine for itself the practical effect, the operating incidence, of the tax, and upon the basis of its own determination, to pass upon the constitutionality of the tax.

Lawrence v. *State Tax Comm.*, 286 U. S. 276, 280 (1932);

Southern Pacific Co. v. *Gallagher,* 306 U. S. 167, 177 (1939);

Wisconsin v. *J. C. Penney Co.,* 311 U. S. 435, 443 (1940);

Nelson v. *Sears, Roebuck & Co.,* 312 U. S. 359, 363 (1941);

Society for Savings v. *Bowers,* 349 U. S. 143, 151 (1955);

Werner Machine Co. v. *Director of Taxation,* 350 U. S. 492, 493 (1956);

American Oil Co. v. *Neill,* 380 U. S. 451, 455 (1965);

In *American Oil Company* v. *Neill, supra,* this Court, per Warren, C.J., stated at 380 U. S. 455:

> "When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form. *Wisconsin* v. *J. C. Penney Co.,* 311 U. S. 435, 443-444; *Lawrence* v. *State Tax Comm'n.,* 286 U. S. 276, 280 and cases cited therein. This approach requires us to determine the ultimate effect of the law as applied and enforced by a State or, in other words, to find the operating incidence of the tax. *Connecticut Gen. Life Ins. Co.* v. *Johnson,* 303 U. S. 77, 80."

It is impossible to perceive how the privilege of exercising a corporate franchise can mean, in practical effect, anything different from a corporation's doing business. Obviously, if a corporation does anything at all lawfully, it is exercising the powers granted in its corporate franchise. It is equally difficult to perceive how a corporation

can own capital or property without its thereby doing business. Similarly, if a corporation maintains an office, it is doing business. The operating incidence of the New Jersey tax is no different, in substance, from that of the Connecticut tax involved in *Spector*. In this respect, therefore, there is no meaningful distinction between the *Spector* case and the case at bar.

Parenthetically, by owning property in New Jersey, appellant has subjected itself to substantial real estate taxes —$125,674.00 over a ten year span, of which amount, $75,068.00 was paid during the two years following the acquisition of the present Kearney Terminal (*infra* p. 60a). As a consequence of doing business in New Jersey, appellant paid, without protest, various New Jersey taxes in 1960, totaling $89,943.00 (50 N. J. 481; 236 A. 2d 582; *infra* p. 10a) as against which the corporation business tax for 1960 would amount to $7,334.50 (50 N. J. 481; 236 A. 2d 582; *infra* p. 10a). It is obvious that a corporation that does business in New Jersey or owns or employs capital or property in the state, does pay substantial state taxes for such privileges, even though it be exempt from the corporation business franchise tax. Appellant admits that it does business in New Jersey but says that since it is a foreign corporation engaged solely in interstate commerce, New Jersey cannot, consistently with the Commerce Clause, impose a franchise tax upon its privilege of doing so.

Murdock v. *Pennsylvania*, 319 U. S. 105, 113 (1943);

Northwestern Cement Co. v. *Minnesota*, 358 U. S. 450, 463-464 (1959).

A foreign corporation engaging solely in interstate commerce in New Jersey is exercising a privilege which New Jersey can not tax, since it is a federal privilege protected

by the Commerce Clause. Owning capital or property in New Jersey as part of the exercise of such federal privilege must be equally exempt from a state franchise tax.

Nor is the tax rendered valid merely because it is in lieu of an ad valorem tax on intangibles as the court below erroneously held (50 N. J. 483-490; 236 A. 2d 583-586, *infra* pp. 13a-19a). A tax cannot be saved from unconstitutionality merely because a different scheme might have been imposed a lawful levy.

A *property* tax in lieu of all other taxes may be validly imposed upon a foreign corporation engaged solely in interstate commerce, *Postal Telegraph Cable Company* v. *Adams*, 155 U. S. 688, 698 (1895); *Railway Express Agency* v. *Virginia*, 358 U. S. 434 (1959)*, provided that "payment be not made a condition precedent to the right to carry on the business", *Postal Telegraph Cable Company* v. *Adams*, *supra*, 155 U. S. 696. However, payment of the New Jersey tax is made a condition of the right to carry on business, L. 1945, c. 162, p. 573, §21; N.J.S.A. 54:10A-21. Moreover, it has been uniformly held, and was reiterated in the opinion below that the tax here involved is a franchise, or privilege, impost (see opinion below, 50 N. J. 481; 236 A. 2d 582, *infra* p. 11a) and is not a property tax, *Werner Machine Company* v. *Director of Division of Taxation*, 17 N. J. 121, 125 (1954); Id. 350 U. S. 492, 493 (1956).

There are clearly questions of substance presented by this appeal, such as should be determined by this Court, as to the operating incidence of the tax under review and as to the validity of such tax under the Commerce Clause.

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* The state court opinion in this case, 199 Va. 589, 100 S. E. 2d 785, makes it clear that the tax was a property tax and not an excise upon the privilege of doing business, 100 S. E. 2d 789-791, 795.

2. It is of importance that this Court declare whether *Spector Motor Service v. O'Connor* is still the law.

Spector Motor Service v. *O'Connor*, 340 U. S. 602 (1951) has been frequently cited by this court as authoritative, and it has never been overruled or adversely criticized in an opinion of the Court. Indeed, all of the opinions of this Court in which *Spector* has been cited seem to recognize and accept its authority.

Memphis Steam Laundry v. Stone, 342 U. S. 389, 393 (1952);

Railway Express Agency v. *Virginia*, 347 U. S. 359, 368 (1954);

Northwestern Cement Company v. *Minnesota*, 358 U. S. 450, 463 (1959);

General Motors Corp. v. *Washington*, 377 U. S. 436, 446 (1964).

The learned court below—disregarding the admonition of Judge Learned Hand: "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time but whose birth is distant;" *Spector Motor Service* v. *McLaughlin*, 139 F. 2d 809, 823 (2d Cir. 1943),—concluded that this Court today would not follow *Spector*, 50 N. J. 487; 236 A. 2d 585, *infra* p. 17a. It is important that there be no doubt of the position of this Court on an issue so fundamental and of such far reaching practical significance as the proper application of the Commerce Clause of the United States Constitution to a state tax imposed upon a foreign corporation engaged solely in interstate commerce.

If jurisdiction of this appeal is not noted, every tax authority of every State in the nation will conclude that

Spector is dead. The fate of *Spector* should be determined not by the speculating of the Court below that this Court would no longer follow it, but by the decision of this Court on the merits.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are substantial and are of importance to the appellant and to the State of New Jersey, as well, and also, to the commerce of our nation and to the public in general. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Opinion of Supreme Court of New Jersey

On appeal from the Division of Tax Appeals in the Department of the Treasury.

Argued September 27 and October 10, 1966. Decided Dec. 18, 1967.

Mr. Nicholas Conover English argued the causes for appellants. (*Messrs. McCarter & English,* attorneys).

Mr. Alan B. Handler, First Assistant Attorney General, argued the causes for respondent. (*Mr. Arthur J. Sills,* Attorney General of New Jersey, attorney).

The opinion of the Court was delivered by
HALL, J.

The question on these consolidated appeals is whether New Jersey may constitutionally impose its corporation business tax, N.J.S.A. 54:10A-1, *et seq.,* upon motor freight trucking companies conducting an exclusively interstate business in the state, involving, however, substantial local activities and property. Appellants (taxpayers) contend that the case is on all fours with *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602, 95 L. Ed. 573 (1951), which held that a state franchise tax for the privilege of doing business within the state could not be applied to such an enterprise by reason of the commerce clause of the United States Constitution, Art. I, Sec. 8, cl. 3. Respondent (Director) urges that the levy is valid as to

the taxpayers because the basis of our tax is vitally different from that in the Connecticut statute involved in *Spector* and, in any event, subsequent decisions of the United States Supreme Court indicate a less rigid view of the constitutional propriety of subjecting interstate businesses, by means of state taxes of the type of New Jersey's corporation business levy, to their fair share of the costs of state government, in view of the protection and benefits they receive therefrom.

It goes without saying that we fully recognize we are bound by the holdings of the United States Supreme Court as to federal limitations on state taxation of interstate business in the absence of Congressional action. But that court over the years has varied considerably in its approaches in this field. As Mr. Justice Frankfurter commented in *Freeman* v. *Hewit,* 329 U. S. 249, 251-252, 91 L. Ed. 265, 271 (1946):

> "The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent States.
>
> "The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the par-

ticular cases and as the product of preoccupation with their special facts."

Professor Hellerstein in his survey of the court's changing approaches contained in *State and Local Taxation, Cases and Materials* (2nd Ed. 1961), 158-168, puts it this way:

> "The present posture of the Court is characteristic of its entire history in dealing with Commerce Clause tax issues—the great issues involved reflect sharp differences in approach among the Justices, the leading cases are decided by slim majorities over strong dissent, and both the rationale and holdings are fluid and dynamic, with one decade's minority becoming the next decade's majority, only to be displaced in another decade by a new majority." (At p. 164).

Our obligation is therefore that so well expressed by Judge Learned Hand in his dissenting opinion on an earlier phase of *Spector* in the Court of Appeals for the Second Circuit:

> ". . . I conceive that the measure of [a lower court's] duty is to divine, as best it can, what would be the event of an appeal [to the United States Supreme Court] in the case before it." (*Spector Motor Service, Inc.* v. *Walsh*, 139 F. 2d 809, 823 (1944)).

The taxes involved are for the years 1946 to 1960, inclusive. The case is here for the second time with respect to appellant Roadway Express, Inc. (Roadway). It first sought to challenge constitutional applicability by an action in lieu of prerogative writ and for a declaratory

judgment. This court affirmed the dismissal of the suit for failure to exhaust administrative remedies through appeal to the Division of Tax Appeals (Division). *Roadway Express, Inc.* v. *Kingsley,* 37 N. J. 136 (1962). Justice Jacobs pointed out that the nature of the challenge called "for careful examination of the true nature of the tax . . . and the detailed facts relating to the properties and activities of [Roadway] within New Jersey", dictating the taking of evidence and the making of factual findings and legal determinations in the first instance by "the administrative officials designated by the Legislature for that purpose". (37 N. J. at 140).

Thereafter the Director, in August 1962, made formal determinations of the taxes asserted to be due as to both taxpayers, who took appeals therefrom to the Division. (We are advised all the taxes so levied were paid under protest). That agency made full findings and conclusions in December 1965, holding the tax validly applicable to the taxpayers and affirming the Director's determinations. The taxpayers' appeals to the Appellate Division, R.R. 4:88-8(a), were certified on our own motion prior to argument there. R.R. 1:10-1.

The basic provision of the New Jersey corporation business tax, adopted by L. 1945, c. 162, reads as follows:

> "*Every domestic or foreign corporation* which is not hereinafter exempted shall pay an *annual franchise tax* for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, *for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in*

Appendix A

lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act. . . . ." (N.J.S.A. 54:10A-2). (Emphasis added.)

The measure of the tax is allocated net worth (stockholders' book equity) plus, since L. 1958, c. 63, allocated net income (related to taxable income as reported to the federal government, with certain exceptions not here pertinent). N.J.S.A. 54:10A-4(d) and (k) and 5. Allocation in the case of multi-state activities, to determine the amount properly attributable to New Jersey, is computed, in the case of net worth, by application of the greater of either an assets allocation formula or a three-factor (Massachusetts) business allocation formula, and in the case of net income, by use of the business allocation formula. N.J.S.A. 54:10A-5 and 6. The amount of the tax is fixed by applying specified percentages to the allocated figures. As to net worth, the quite nominal rate is, subject to certain minima, 2 mills per dollar on the first $100,000,000 (increased from 8/10 of a mill by L. 1954, c. 88), 4/10 of a mill on the second $100,000,000, 3/10 of a mill on the third $100,000,000 and 2/10 of a mill on all amounts in excess thereof. As to net income, the rate is a flat 1¾%.[1] N.J.S.A. 54:10A-5 and 6. See *United States Steel Corporation* v. *Director, Division of Taxation,* 38 N. J. 533, 539-540 (1962); *F. W. Woolworth Co.* v. *Director of Division of Taxation,* 45 N. J. 466, 473-475 (1965).

It should be noted that the taxpayers do not contend that the tax here is discriminatory against interstate busi-

[1] This has been raised to 3¼% by L. 1966, c. 134.

nesses or that it is an undue burden on interstate commerce. They do not challenge the allocation formulas as unfair as applied to an interstate business like theirs and do not suggest the result of the New Jersey tax is multiple taxation elsewhere. Indeed, they do not at all attack the amount of the taxes determined by the Director.

Turning to the detailed facts of the activities and properties of these taxpayers as developed before the Division, Roadway is a Delaware corporation, having its home office in Akron, Ohio. It succeeded to the business of an Ohio corporation of the same name in 1954. It is engaged in motor carriage of general commodities as a common carrier over a large section of the country, pursuant to certificates of convenience and necessity issued by the Interstate Commerce Commission. It has never been authorized, or made application to be authorized, by New Jersey to do business in this state. Conversely, there is nothing to show New Jersey has ever attempted to compel it to obtain such authority or sought to exclude it from carrying on its business here.[2]

Roadway's operations in New Jersey have generally been of the same type during the years involved, although they have steadily expanded in size. Since the evidence below dealt mostly with the picture in 1960, our references will be to that year unless otherwise noted. In

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[2] In this connection it may be mentioned that Roadway had refused to file state tax returns prior to our earlier decision. 37 N. J. 136. The Director had previously proceeded against it, not by an effort to exclude it from the state by a suit for an injunction as the act authorizes (N.J.S.A. 54:10A-20), but by methods of collection of the taxes he assessed out of the corporation's property in the state pursuant to the state tax uniform procedure law, N.J.S.A. 54:48-1, *et seq.*

that year it maintained two terminals in the state serving the New York-New Jersey metropolitan area. The principal one was in Kearny (which in 1959 had replaced a generally similar facility in Hoboken), with a subsidiary one in Bound Brook (since moved to another location). It owned and operated two types of trucking vehicles. One was over-the-road tractor-trailers carrying truckload lots of goods to and from its New Jersey terminals from and to its terminals in other states, as well as, in some instances, direct delivery or pick-up at the customer's place of business. About 100 of these vehicles came into the Kearny terminal in an average week. They were "domiciled" elsewhere and not registered or licensed by New Jersey. The other type was the so-called city fleet of straight trucks, tractors and trailers, more than 60 in number, which were kept at Kearny and registered, licensed and inspected in New Jersey.

The city fleet vehicles picked up freight at a customer's place of business in New Jersey and other parts of the metropolitan area and brought it to the Kearny terminal, where it was unloaded on the dock and then reloaded on an over-the-road unit for shipment out of the state. An inbound shipment was handled in reverse order. The Bound Brook terminal had no dock facilities and freight to and from that depot usually moved in over-the-road truckload trucks, with less than truckload shipments being transported to Kearny for consolidation and interstate shipment from there. In addition, some customers delivered freight to the Kearny terminal by their own vehicles and picked up shipments to them there. In such cases the customer was given an allowance on the total freight charges, which were based on carriage from the shipper's place of business to that of the consignee.

Appendix A

It is clear that Roadway did not carry freight shipped by a customer located in New Jersey to a destination in the state. All the freight traffic with which the New Jersey terminals were concerned must be said to be interstate in character, despite the fact that some of it was temporarily interrupted in its journey at the Kearny terminal for unloading and reloading.

These New Jersey traffic activities were very substantial in total. In 1960 Roadway's over-the-road vehicles alone travelled over two and a half million miles on state, county and municipal highways here and the total mileage in New Jersey, with the city fleet trucks included, was estimated to have exceeded 11 million miles. In 1958 charges to shippers for freight originating in New Jersey amounted to slightly over $4,000,000 and similar charges for freight delivered here to almost $3,800,000. In 1960, out of total gross revenues from all points amounting to $71,380,000, $5,728,000 was derived from the New Jersey operations. Although the New Jersey figures include revenue from freight collected from or delivered to the whole metropolitan area, the greater portion of the freight originated in New Jersey and all of it was handled in New Jersey at some time during the shipment.

Equally substantial was the physical nature of the Kearny terminal and the personnel activity connected therewith. Roadway built the terminal in 1959 on a 13 acre plot it owned. The total investment was $941,120. There is a two-story office building containing 7,338 square feet of space, a one-story loading and unloading dock building 101 feet wide and 409 feet long, and a one-story service garage 60 feet wide and 99 feet long. Employed there under three management representatives were 6 dispatch-

ers, 3 supervisors in charge of 6 dock foremen who supervised 55 dock employees, an office manager, a claim supervisor and 48 clerical workers, 86 city fleet drivers, 6 garage employees, and a sales manager in charge of 5 salesmen. (The Bound Brook terminal was located on premises rented at $1800 per year and there were only 2 employees at that location).

The Kearny garage repaired and maintained the city fleet. It also serviced and made some repairs on over-the-road vehicles. Local business establishments made emergency major motor repairs to these vehicles on a contractual basis.

The Kearny sales staff was responsible for soliciting business in the entire metropolitan area, each salesman making 50 calls per week using leased passenger cars. The company also mailed flyers to customers, maintained listings in telephone directories in New York and parts of New Jersey and advertised in various trade journals.

Roadway maintained one account in a New Jersey bank. In 1958 the average amount on deposit there was $154,238, representing cash receipts collected in the state. This account was subject to withdrawal only by the home office. New Jersey employees were paid by check on an Akron bank and local purchases, which amounted in 1958 to over $250,000, were paid for by sight drafts issued by New Jersey office employees and accepted by the Akron bank.

Also of significant note is the fact that Roadway has used the New Jersey courts to enforce claims and defend claims against it. It apparently has never contended that it is not doing business in the state for purposes of valid service of process upon it and, again, it seemingly has not been excluded from bringing actions in the state courts as our statutes direct with respect to ordi-

nary foreign corporations not authorized to do business in the state. N.J.S.A. 14:15-3 and 4.

Despite the localized nature of most of these activities, we assume for present purposes they are so intimately connected with the exclusively interstate freight business that, under current law, they are not to be classified separately as intrastate in character for state taxation purposes.

In 1960 Roadway paid local property taxes on the Kearny terminal of $32,044, New Jersey "vehicle taxes" (presumably state registration fees for the city fleet vehicles of $13,473, state taxes on motor fuel purchased in New Jersey of $23,907, "payroll taxes" (presumably the employer's share of unemployment compensation contributions for New Jersey employees) of $18,448 and other state or local taxes of $2,071, amounting in total to $89,943.

The record presented to us disclosed only the corporate business tax determined by the Director for 1960, which was in the amount of $7,334.50.

The business of appellant Pilot Freight Carriers, Inc. (Pilot) was conducted in a manner so similar to that of Roadway that an opposite result was not urged by reason of the few differences that did exist. The Division therefore did not make detailed findings as to it and held that its tax liability was controlled by the decision as to Roadway. It may be noted that Pilot, a North Carolina corporation based in Winston-Salem in that state, did register as a foreign corporation with the New Jersey Secretary of State. Its operations were somewhat smaller, both overall and in New Jersey. It leased its terminal in Moonachie from a closely related foreign corporation, which was licensed to do business in this state

and has regularly paid corporation business tax here, and its vehicles were serviced and repaired at that location by another related corporation, likewise licensed and paying corporation business tax. The Director fixed Pilot's tax liability for 1960 at $266.70.

The nature of the New Jersey corporation business tax must next be considered. It cannot be doubted, as the taxpayers urge and the Director concedes, that the tax is a franchise, *i.e.*, a privilege, impost. The statute so designates it, N.J.S.A. 54:10A-2, the regulations (*Corporation Business Tax Regulations* (1959), p. 5) so describe it, and this court has so stated, albeit in contexts different than here involved and without exploration of its nature and aspects beyond the limited concern in the particular case. *Werner Machine Co.* v. *Director of Division of Taxation*, 17 N. J. 121 (1954), aff'd 350 U. S. 492, 100 L. Ed. 634 (1956); *United States Steel Corporation* v. *Director, Division of Taxation, supra* (38 N. J. 533); *F. W. Woolworth Co.* v. *Director of Division of Taxation, supra* (45 N. J. 466).

In *Werner*, the plaintiff, a New Jersey corporation, contended that the tax, then measured only by net worth, was in essence a tax on the underlying property making up that value and so the tax base could not constitutionally include tax exempt United States government bonds owned by the corporation. It was in this context that we said the tax was not on property, but a *bona fide* annual excise ". . . for the privilege of exercise by the corporation of corporate powers in this State". (17 N. J. at 126-127). The United States Supreme Court, in affirming, accepted this conclusion and held the tax valid despite the inclusion of federal bonds in the determination of net worth. In *United States Steel*, the taxpayer was also

a domestic corporation and the short discussion of the nature and history of the tax as a franchise levy (38 N. J. at 539-540) was set forth only as background to consideration of the question when corporate mergers took place within a certain tax year or years. *Woolworth* involved a New York corporation authorized to do business in New Jersey and engaged in retail store intrastate operations here. The issues were the proper base for computation of net worth and net income allocable to New Jersey and the matter of fair application of the allocation formulas. Our mention of the nature of the tax and the various provisions of the statute (45 N. J. at 473-475) was simply by way of introduction to consideration of those issues. No previous case in this court has had to be concerned with the current question of the constitutional applicability of the tax to a foreign corporation engaged solely in interstate commerce here or consideration of the statutory provisions in relation to such a problem.

The basis of the tax is a broad one and is not, as the taxpayers contend, imposed merely or solely for the privilege of doing business in New Jersey. It is a state tax applying generally to all domestic and foreign corporations, except those exempted by N.J.S.A. 54:10A-3—primarily financial institutions and certain public utilities taxed specially by other acts. It was certainly intended to reach foreign corporations doing an intrastate business, an interstate business, or both, as far as could constitutionally be done, and its disjunctive recital of the various privileges must be considered with the intended overall coverage in mind. It was enacted in 1945 (L. 1945, c. 162), before *Spector* (and not amended since as far as the basis of the tax is concerned) and during the period

when the approach of the United States Supreme Court may be said to have been that of the so-called multiple taxation doctrine. See Hellerstein, *supra*, at pp. 161-163. The privileges taxed, N.J.S.A. 54:10A-2, are stated, as we have indicated, in the alternative and are not confined, as was the Connecticut statute in *Spector*, to that "of carrying on or doing business within the state". (340 U. S. at 603, n. 1, 95 L. Ed. 576). Thus the privilege taxed may also be either that of exercising its corporate franchise within the state, *or* of owning or employing capital or property in the state, *or* of maintaining an office in the state. The last two stated alternatives clearly point particularly to the nexus of localized activity within the state of a nature and extent, as here, where it can realistically be said that state government substantially affords protection and gives benefits to the corporation's enterprise within the state.

Perhaps even more significant is the express "in lieu" feature of the tax—"And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act". N.J.S.A. 54:10A-2. A bit of history is important here. Under the New Jersey tax structure, generally speaking, taxes for municipal, school district and county needs are assessed and collected at the municipal level by an *ad valorem* levy at a local rate on real and personal property within the municipality. These entities further receive revenue by grants or other distributions from the state government which has become increasingly substantial. The state itself also has the power to tax the same property but it has not exercised it for many years. See *East Orange* v. *Palmer*, 47 N. J. 307, 317 (1966). Its

revenues come almost exclusively from a variety of excises. New Jersey has never had a general direct corporate or personal income tax.

Until 1945 the local levy on personal property applied to both tangibles and intangibles of individuals and corporations, including foreign corporations doing business in the state. The statute as to the latter, R.S. 54:4-19, provided that they should "be assessed for the amount of capital usually employed in this state in the doing of such business, and not otherwise taxed as real property or tangible personal property", the assessment to be made in the municipality "where the business is most usually carried on and transacted". In addition, domestic corporations had long been subject to a franchise tax on their capital stock at the state level, R.S. 54:13-1 to 10, inclusive, and after 1937, foreign corporations doing business in the state were also subject to a similar impost, with a provision, as to corporations engaged in multi-state activities, for allocation of the total capital stock on the ratio of the gross income from the business done in the state to the total gross income from its entire business, R.S. 54:32A-1 to 53, inclusive. See *Corporation Business Tax Regulations* (1959), p. 5.

The situation which had developed by 1945 and which led to the adoption of the state corporation business tax by L. 1945, c. 162 (N.J.S.A. 54:10A-1, *et seq.*) is succinctly described in *United States Steel, supra* (38 N. J. at 539):

> "The Corporation Business Tax Act (1945) was adopted because of dissatisfaction with prior law under which intangible property was taxable *ad valorem* at the substantial rates applicable to realty and tangible personalty. While some owners of in-

> tangibles paid at negotiated rates or escaped taxation completely, others were suddenly selected for full taxation, a phenomenon which was dubbed 'tax lightning.' The Legislature accepted the recommendation in the *Report of the Commission on Taxation of Intangible Property* (1945), p. xxii, that the statute be adopted to supersede such taxation of intangibles and as well the then-existing capital stock tax act."

The statute specifically repealed the capital stock tax as to both domestic and foreign corporations, N.J.S.A. 54: 10A-26, and another act, L. 1945, c. 163, adopted at the same time, expressly removed from the general tax law all provisions permitting taxation of intangible personal property, including R.S. 54:4-19.

The net income measure of the tax, as another element in addition to net worth, was inserted by L. 1958, c. 63, pursuant to the recommendation of the *Ninth Report of the Commission on State Tax Policy* (1958). The essential purpose was to provide an increase in the state's revenues. It may be surmised that historical antipathy in New Jersey to an income tax as such led to inclusion of it rather as another element of the franchise tax, although otherwise it has all the attributes of a direct levy on income. There seems to be no question that, if it had been enacted and denominated as a direct corporate income tax, it would have been validly applicable to the taxpayers here by virtue of *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U. S. 450, 3 L. Ed. 2d 421 (1959).

We think it is also clear from the recent decisions of the United States Supreme Court that a state corporate

tax may be properly applied to an exclusively interstate business though it be denominated a "franchise" tax. See Note, *Developments—State Taxation,* 75 Harv. L. Rev. 953, 1031-1033 (1962). Constitutional propriety is not to be determined by labels or semantics, but rather by the operating incidence of the particular levy. While a tax basis worded as is New Jersey's has never been passed upon by the nation's highest court, we earnestly believe that the current course of its opinions in the field, as we read them, points to the conclusion that this levy is valid as applied to exclusively interstate business.

Our review of these decisions begins, of course, with *Spector* (340 U. S. 602, 95 L. Ed. 573 (1951)). There the taxpayer conducted an exclusively interstate trucking business in Connecticut in a manner not significantly different from Roadway and Pilot. The taxing statute, previously quoted in significant part, had been construed by the Connecticut Supreme Court of Errors as imposing a tax, measured by allocated net income, on the franchises of domestic and foreign corporations solely for the privilege of carrying on business in the state. Though nondiscriminatory as to interstate commerce, it was said the levy could not rest on any other basis and was not in lieu of any property tax. The majority, speaking through Mr. Justice Burton, held that, since the state court had determined the tax attached solely to the taxpayer's franchise to do interstate business, this "channel" through which Connecticut sought to make interstate commerce pay its way was an unconstitutional one. It specifically said, however, that "[t]he State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State." 340 U. S. at 609, 95 L. Ed. at 578.

Appendix A

Mr. Justice Clark, joined by Mr. Justice Black and Mr. Justice Douglas, dissented. He urged that the result represented a reinvigoration of old decisions long since enfeebled by later cases, that the majority had rested on a label and that the state had lost because of its failure to use the right tag. He pointed out that it seemed clear the majority would have sustained the tax if the state legislature or its highest court had described the levy as one for the use of highways or in lieu of an *ad valorem* property tax. He failed to see a proper constitutional distinction from the situation where, if some of this taxpayer's same total Connecticut business had been intrastate, the same tax in the same amount would have been upheld. He felt strongly that exclusively interstate commerce could constitutionally be required to pay its way for the facilities and services of the state it necessarily used, that such business received adequate protection where the state levy was fairly apportioned and non-discriminatory, and that there was "no reasonable warrant for cloaking a purely verbal standard with constitutional dignity." 340 U. S. at 614, 95 L. Ed. at 581.

We have made these detailed references to the majority and dissenting points of view in *Spector* because we are convinced that the minority approach has since become the court's general view and that the later decisions demonstrate the case remains authority, at the very most, only in the precise statutory situation there found.

That progression of approach is well indicated by comparing *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359, 98 L. Ed. 757 (1954) (*Railway Express I*) with *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 3 L. Ed. 2d 450 (1959) (*Railway Express II*). In *Railway Express I*, the court struck down a portion of

a Virginia tax statute applying only to express companies. The taxpayer was engaged solely in interstate business in the state. (It was a foreign corporation and under Virginia law such an entity could not exercise intrastate public service powers; a separate Virginia corporation had been organized to conduct its intrastate business). The statute provided for a state property tax on such companies levied on intangible personal property and money (to which no objection was made) and, "for the privilege of doing business in this State", in addition to the property tax, an "annual license tax" upon gross receipts earned in the state "on business passing through, into or out of this State." 347 U. S. at 362, 98 L. Ed. at 761. The majority of the court held that the license tax was no more than a privilege tax that, like the one in *Spector,* could not be applied to an exclusively interstate business. Mr. Justice Clark, again in dissent but now joined by three other members of the court, stated he would uphold the tax on the same grounds he urged in *Spector,* as well as commenting that he thought the tax was acceptable even under the *Spector* rationale, since Virginia's highest court had construed the impost to be an *ad valorem* tax on intangible property.

Thereafter Virginia amended its express company taxing law and the new statute came before the court in *Railway Express II.* The tax was now denominated "a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock", measured by "the gross receipts derived from operations within" Virginia. 358 U. S. at 438, 3 L. Ed. 2d at 454. The tax was sustained and this time Mr. Justice Clark wrote the opinion joined in by six members of the court. One of the other three con-

curred in the result and the remaining two dissented. Stress was laid on the fact that the impost was no longer called a "license tax" laid on the privilege of doing business in Virginia and that it was not a condition precedent to engaging in interstate commerce in the state. The tax was found to be, in harmony with the state Supreme Court's view, one on the taxpayer's intangible property, *i.e.*, its "going concern" value. *Spector* was not mentioned in connection with the substantive features of the tax. Mr. Justice Brennan and Mr. Justice Harlan, in concurring opinions, expressed some reservation as to the property tax thesis. The former indicated the tax was also valid as a fairly apportioned, non-discriminatory levy, consistent with the state's tax structure, requiring the interstate express company "only to pay its share." Mr. Justice Harlan thought the impost was entirely proper as an "in lieu" tax.

We think these two cases demonstrate that while a state, under a literal view of the *Spector* thesis, may not impose a tax upon interstate commerce solely for the privilege of doing that business in a state, a franchise tax may be imposed thereupon if the incidence or basis is a privilege other than engaging in that business as such or when the levy is in lieu of other state taxes which could be validly imposed on exclusively interstate business.

The same day *Railway Express II* was decided, the court handed down its opinion in *Northwestern States Portland Cement Co.* v. *Minnesota*, *supra* (358 U. S. 450, 3 L. Ed. 2d 421) of which Mr. Justice Clark was also the author, joined in by five other members. Justices Frankfurter, Whittaker and Stewart dissented. (The opinion actually covered two separate cases from two differ-

ent states, the other being *Williams* v. *Stockham Valves & Fittings, Inc.*, coming up from Georgia. The statutes, corporate activities and questions were substantially the same and so we will refer only to the Minnesota case). At issue was the validity of Minnesota's apportioned, nondiscriminatory direct income tax expressly levied on domestic and foreign corporations whose business within the state consisted exclusively of foreign or interstate commerce or both. The activities and physical connections in the state of the taxpayer, a foreign corporation, were somewhat minimal. It owned nothing therein except some furniture in a small office it rented as headquarters for a secretary and four salesmen, who solicited orders for cement throughout the state. The orders were accepted at the plant in Iowa and all shipments were made from that point directly to the Minnesota customers.

The tax was sustained. The importance of the decision in relation to the problem before us is in what we believe to be the underlying rationale and emphasis, indicating a broader view by a majority of the present court of the propriety of state taxation of interstate commerce than the rather rigid formalism found in *Spector* and *Railway Express I*, despite the fact that the tax involved here was an income and not a privilege tax. That thought is perhaps best expressed in this quotation from the opinion:

> ". . . The taxes are not regulations in any sense of that term. Admittedly they do not discriminate against nor subject either corporation to an undue burden. While it is true that a State may not erect a wall around its borders preventing commerce an entry, it is axiomatic that the founders did not intend to immunize such commerce from carrying its

> fair share of the costs of the state government in return for the benefits it derives from within the State. The levies are not privilege taxes based on the right to carry on business in the taxing State. The States are left to collect only through ordinary means. The tax, therefore, is 'not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce.' Underwood Typewriter Co. v. Chamberlain, supra (254 US at 119). . . ." (358 U. S. at 461-62, 3 L. Ed. 2d at 429).

The court expressly spoke of *Spector* as not requiring a contrary result because the tax there was imposed for the privilege of doing interstate business within the state, meaning to us, in the light of the overall philosophy of the opinion, that that case is to be confined to its exact situation.[3]

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[3] Shortly after the decision in *Northwestern Cement,* Congress passed P.L. 86-272 (1959), 73 Stat. 555, 15 U.S.C.A. § 381, *et seq.,* denying the states the power to impose taxes on or measured by net income derived within the state from interstate commerce, if the only business activities carried on within the state are the solicitation of orders for sales of tangible personal property and the orders are sent outside the state for approval or rejection and are filled by shipment or delivery from a point outside the state. This very limited prohibition obviously does not apply to the taxpayers in the case at bar. The legislative approach being negative and not positive, we believe no inference may be drawn therefrom as to the power of the states to otherwise tax interstate commerce. This appears to be the view expressed in the report of the Senate Committee handling the legislation. *U. S. Code Congressional and Administrative News,* 86th Congress, First Session (1959) 2548, 2551.

Appendix A

The final recent case to be mentioned is *General Motors Corp.* v. *Washington*, 377 U. S. 436, 12 L. Ed. 2d 430 (1964), where the opinion was also written by Mr. Justice Clark for a five member majority. The decision appears to have bearing on the issue here, not because of its facts, which are complex and differ considerably from those at bar, but rather, again, by reason of the underlying approach the court took. The tax was for the privilege of engaging in business activities within the state measured, as to the particular type of business involved, by the taxpayer's gross wholesale sales of motor vehicles, parts and accessories delivered within the state. General Motors conceded that certain of such sales were taxable, but that others were not because they were wholly in interstate commerce. The court upheld the tax as to all. Though a tax expressly based on the privilege of engaging in business in the state was involved, the court keyed its discussion to the proposition that interstate commerce must pay its just share of the state tax burden and in referring to *Spector*, quoted only that part of the opinion (previously set out herein) which expressed the view that a state is not precluded from imposing taxes upon activities or aspects of interstate business other than the privilege of doing such business. Mr. Justice Clark said that was what Washington sought to do and that the taxpayer had not shown that any of its activities within the state—so enmeshed as they were in local connections that some of them were concededly taxable—were incidents the state could not reach.

On the thesis of the progression of rationale shown by these decisions, viewed in the light of our statutory provisions, we conclude that it is correct to say that the New Jersey corporate business tax, by reason of the alterna-

tive bases set forth in the act, is not imposed upon foreign corporations merely or solely for the privilege of doing interstate business in New Jersey. We think also there is no longer necessarily any conclusive magic in the denomination of a tax as a "franchise" tax or by another label. We believe validity will now be judged, broadly speaking and in the absence of Congressional action, on whether it is a fairly apportioned, non-discriminatory means of requiring such a corporation to pay its just share of the cost of state government upon which it necessarily relies and by which it is furnished protection and benefit. We are of the opinion that the New Jersey tax meets that test as applied to the taxpayers here involved.

It remains established that a tax on an exclusively interstate business verbally based solely on the privilege of doing such business in the state is constitutionally forbidden. We therefore construe that basis of New Jersey's tax to be inapplicable to taxpayers like those involved here. Since a state may not exclude such a corporation from doing such business within it, it may not exact an impost on the thesis of a condition of entry therein. More technically speaking, it is our view that the New Jersey tax is validly applicable to these taxpayers on the foundation of other bases expressed in the statute. The first is that the tax is expressly in lieu of "all other State, county or local taxation upon or measured by intangible personal property" of a foreign corporation, which kind of a tax we conceive could be validly imposed on a corporate entity of another state conducting an exclusively interstate business here. We believe the tax is additionally sustainable as a levy "for the privilege of . . . employing or owning capital or property, or maintaining an office, in this State", if not also "for the privilege of . . . exercising its corporation franchise" here.

N.J.S.A. 54:10A-2. We think such privileges are sufficiently different from that of "doing" interstate business so that they are, in the sense stated in *Spector*, aspects of such business subject to the sovereign power of the state.

As has been previously outlined, these taxpayers' localized activities within New Jersey are very substantial and their reliance upon and the benefits received from the state government are sizeable and readily apparent. *Cf. National Bellas Hess, Inc.* v. *Illinois*, 386 U. S. 753, 18 L. Ed. 2d 505 (1967). Quite apart from the intangible benefits all businesses receive by reason of the very existence of an orderly state government, a couple of specific things come to mind here as examples of particular benefit. The taxpayers' over-the-road vehicles, registered elsewhere and not paying any license fees to New Jersey, in traveling over two and a half million miles in a year on highways here, must have very considerably utilized toll-free roads constructed and maintained by the state as well as county roads built or improved by state aid distributions. The vehicles and their cargoes were protected by the law enforcement activities of the state police force. The use of the courts necessarily also involved utilization of facilities and services provided by state revenues.

If a *quid pro quo* is thought of as having any bearing, the other taxes Roadway and Pilot paid cannot reasonably be thought of as adequate for the benefits and protection supplied by the state. Local real estate property taxes, imposed on all property owners, go only for local needs and no part thereof finds its way to the state treasury. The registration fees for the city fleet vehicles are not, under our system, moneys dedicated for highway purposes, but go into the general state fund. The

same is true of motor fuel taxes, but these only produce revenue to the extent that a motor vehicle operator chooses to purchase fuel within the state. The so-called payroll taxes cannot be applied for general state purposes, but must become part of special funds only usable to pay unemployment compensation and similar benefits.

The judgments of the Division of Tax Appeals are affirmed.

APPENDIX B

Judgment of Supreme Court of New Jersey

It is hereupon ordered and adjudged that the judgment of the Division of Tax Appeals is affirmed with costs and it is further ordered that the record be remitted to the Division of Tax Appeals to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice.

Judgment Entered December 18, 1967.

Mandate Issued 12-22-67.

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX C

Opinion of Division of Tax Appeals

Appearances:

Messrs. McCarter & English by Mr. Nicholas Conover English for the petitioner.

Mr. Arthur J. Sills, Attorney General of New Jersey, by Mr. Alan B. Handler, First Assistant Attorney General, for the respondent.

Kopp, C.

Petitioner, Roadway Express, Inc., appeals from respondent's determination, dated August 29, 1962, imposing corporate business taxes for the years 1946 to 1960, inclusive, pursuant to the Corporation Business Tax Act (1945) N.J.S.A. 54:10A-1 *et seq.*

This appeal was duly assigned to me for hearing and determination. The parties waived a hearing and have submitted the matter upon a detailed stipulation of facts, depositions, interrogatories and briefs.

Originally, petitioner instituted an action in the Superior Court of New Jersey to obtain relief from the said taxes imposed by respondent but that action was dismissed because of the failure of petitioner to exhaust its administrative remedy. This decision was sustained by the New Jersey Supreme Court. *Roadway Express, Inc.* v. *Kingsley,* 37 N. J. 136 (1962). Justice Jacobs, in that opinion, points out that the issue under consideration will "call for careful examination of the true nature of the tax (compare *Railway Express Agency, Inc.* v. *Virginia,* 347 U. S. 359, 74 S. Ct. 558, 98 L. Ed. 757 (1954) and *Railway Express Agency, Inc.* v. *Virginia,* 358 U. S. 434, 79 S. Ct. 411, 3 L. Ed. 2nd 450 (1959) and the detailed facts relating to the properties and activities of the plaintiff within New Jersey.". We shall endeavor to comply with that direction.

Appendix C

Facts

Petitioner is a Delaware corporation organized in 1954 and is the successor in interest to Roadway Express, Inc., a corporation of Ohio, to whose franchises, liabilities and businesses it succeeded in 1954 by a merger. (Both corporations are included in the term "petitioner".) Its home office is in Akron, Ohio and it is engaged in the motor carriage of general commodities under Interstate Commerce Commission Certificate of Convenience and Necessity No. MC 2202 issued to it by the Interstate Commerce Commission of the United States Government pursuant to petitioner's application of January 28, 1936 under Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 *et seq.* By said Certificate petitioner is authorized to operate as a common carrier by motor vehicle over certain routes indicated on a map which was introduced in evidence as Exhibit P-2.

As of January 1, 1960 petitioner's total route mileage was 29,078 miles and its route mileage in New Jersey was 308 miles. Its total miles traveled in 1960 were 106,751,720 of which 2,578,857 miles were traveled in New Jersey. This latter figure represents only mileage of over-the-road vehicles and does not represent the additional mileage traveled in New Jersey by pickup and delivery vehicles operated from its New Jersey Terminals. Petitioner's operations in New Jersey have generally been of the same type since 1949 but it has expanded in size by virtue of an increased volume of business.

Between 1949 and 1959 petitioner owned and maintained a terminal in Hoboken on a plot of land 200 feet by 200 feet upon which was located an office building and dock facilities. The one-story office building was 70 feet by 30 feet. The dock was 50 feet by 150 feet and there was an addition of 50 feet by 50 feet for undercover spotting of trucks. No garage was included. The entire facility represented an investment of $126,348.48 and was sold in 1959 for $84,000.00.

Appendix C

From 1953 to 1961 petitioner leased at an annual rent of $1800.00 a terminal at Bound Brook, New Jersey, consisting of a plot of land 150 feet by 116 feet on which was located a one-story office building 16 feet by 20 feet. The property contained no dock space, no freight doors and no garage.

In 1959 petitioner opened its terminal in Kearny, New Jersey, on a plot of land consisting of 12.944 acres which it purchased in 1956. This terminal consists of a two-story office building containing 7,338 square feet. It has a dock containing 41,337 square feet and a garage containing 5,900 square feet, both of which structures are one story in height. Petitioner's investment at Kearny amounted to $941,120.00.

Petitioner has not at any time sublet any part of the facilities at Hoboken, Bound Brook and Kearny. Apparently Kearny is its principal place of operation in New Jersey.

About 100 over-the-road tractor-trailers come into the Kearny Terminal in an average week. In addition to this line-haul fleet there is the city fleet of pickup and delivery vehicles. For 1956 it consisted of 34 vehicles, for 1957 it was 40, for 1958 it was 44, for 1959 it was 61, all of which were domiciled at Kearny and were registered, licensed and inspected in New Jersey. In addition petitioner leases automobiles which are designated as company cars and are used by salesmen working out of Kearny. At no time has petitioner rented motor vehicles owned by it to others for use in New Jersey.

Petitioner's Kearny Terminal is managed by a terminal manager, who before July 17, 1960, reported to a district manager at Philadelphia. Since then such manager reported to a district manager in New Jersey which district manager is also responsible for the operations of petitioner's other freight terminals at Philadelphia in Pennsylvania and at Laurel in Maryland. The district manager re-

ports to a vice-presdent in Winston-Salem, North Carolina. None of the petitioner's corporate officers is, or has ever been, located in New Jersey.

In 1960 petitioner had the following employees working at the Kearny Terminal: 1 terminal manager, 1 assistant terminal manager and 1 operations supervisor. Under these supervisory personnel were 1 chief dispatcher, 5 dispatchers, 1 office manager, 1 claim prevention supervisor, 1 sales manager supervising 5 salesmen, and 3 shift supervisors in charge of 6 dock foremen who supervised 55 dock employees. The city fleet was driven by 86 drivers; the garage had 6 employees, and there were 48 clerical employees.

Petitioner's Bound Brook Terminal manager reported for himself and a dispatcher to the same district manager to whom the Kearny manager reported. For administrative purposes he was not under the jurisdiction and authority of the Kearny manager. Operationally, however, the Bound Brook Terminal was regarded as a substation of Kearny, because most of the over-the-road equipment was furnished through Kearny and the Kearny Terminal received less than truckload shipments from Bound Brook for consolidation with Kearny freight moving out. Freight to and from Bound Brook usually moved in truckload lots, and outbound shipments were dispatched directly from Bound Brook without being routed through the Kearny Terminal.

Generally speaking the Hoboken Terminal had served the same freight handling function as the Kearny Terminal but it had no garage.

The Kearny sales staff is responsible for soliciting business in New Jersey and the metropolitan area. Each salesman makes about 50 calls each week explaining petitioner's various services and soliciting business. Petitioner also mails flyers to customers, maintains listings in telephone

directories in New York and parts of New Jersey and advertises in various trade journals. The sales staff submits weekly reports stating the number of calls made, names of customers and potential business. The salesmen share an office in the Kearny Terminal and receive salaries instead of commissions.

Payrolls for all permanent employees of petitioner at its Hoboken, Kearny and Bound Brook terminals were prepared by petitioner's Home Office in Akron, Ohio, from information furnished by the respective terminals and all employees at its New Jersey terminals have been paid by that office by checks drawn on its account in The Firestone Bank in Akron, Ohio.

Except during the year 1954 petitioner has maintained one bank account in a New Jersey bank. Cash receipts collected in New Jersey are deposited in said account and the funds therein are subject to withdrawal only by the Home Office in Akron, Ohio. There is no bank account in New Jersey subject to withdrawal by petitioner's New Jersey employees. Local purchases are paid for by petitioner's New Jersey employees by sight drafts which are accepted by The Firestone Bank in Ohio which is reimbursed therefor by petitioner on a regular and frequent basis. Such drafts are subject to rejection by the Home Office.

Petitioner's Kearny manager maintains a petty cash fund of $350.00 from which he makes periodic disbursements and which fund is replenished by checks drawn on The Firestone Bank in Ohio. This fund is controlled by the Director of General Accounting at the Home Office in Ohio.

Petitioner's city-fleet in New Jersey is inspected, repaired and maintained at its Kearny Terminal. Its long-haul vehicles are serviced there. Although most repairs are made at that garage, local business establishments make

major emergency repairs on a contractual basis to the motors of over-the-road vehicles and non-emergency repairs are generally made at the Home Office in Akron, Ohio. Occasionally worn-out equipment is sold or disposed of by the Kearny Terminal.

As previously stated petitioner's business consists of hauling freight for business customers or other carriers who do not haul to point to which petitioner does haul. Outbound shipments through the Kearny Terminal are generally handled in one of two ways. When a customer located in New Jersey or the metropolitan area requests service, petitioner dispatches a city truck to pick up the freight and bring it to Kearny where it is unloaded on to the dock and then reloaded on a line-haul unit for shipment out of the State. An inbound shipment is handled in the reverse manner.

The other method of operation is for the customer to deliver the freight directly to the Kearny Terminal for shipment out of New Jersey or the customer receiving goods may pick up the shipment at the Kearny Terminal. In such instances the customer, if he requests it, is given an allowance in the form of a refund.

In no instance has petitioner carried freight shipped by a customer located in New Jersey to a destination in New Jersey. Much of the freight handled at the Kearny Terminal comes from the New York metropolitan area for destinations outside of New Jersey, or goes to that area from origins outside of New Jersey.

Petitioner's operations through its New Jersey terminals produce substantial revenues. In 1958, before the Kearny Terminal began operating, charges to shippers for freight originating in New Jersey amounted to $4,026,944.20, and charges to shippers for goods delivered to points in New Jersey amounted to $3,796,275.80, making the total revenue

derived from activities in New Jersey for that year $7,823,220.00. In 1960 petitioner's total gross revenue was $71,380,270.00 of which $5,728,214.00 was derived from its New Jersey operations. Although the foregoing figures include revenue from freight collected from or delivered to the New York area, the greater portion of the freight originated in New Jersey and all of such freight was handled in New Jersey at some time during the shipment.

In 1958 petitioner's average deposits in New Jersey banks were $154,238.00 and it paid to New Jersey businessmen for local purchases $258,390.86. During the same year it paid New Jersey real estate, motor vehicle, motor fuel, payroll and other taxes amounting to $36,876.00. In 1959 these taxes amounted to $88,068.00 and in 1960 they amounted to $89,943.00.

Although petitioner has never been authorized, or made application to be authorized, to do business in New Jersey as provided by N.J.S.A. 14:15-3 it has nevertheless used the New Jersey courts to enforce claims or defend claims against it and has engaged in substantial business dealings in New Jersey.

ISSUE

Petitioner has never paid without protest any tax under the Corporation Business Tax Act of 1945, N.J.S.A. 54:10A-1 *et seq.* because it contends that it is solely engaged in interstate commerce, that said tax is a *bona fide* franchise tax and that under the Commerce Clause of the Constitution of the United States, Art. I, Sec. 8, cl. 3, the State of New Jersey is prohibited from imposing such a tax upon it. It is not argued that N.J.S.A. 54:10A-1 *et seq.* is unconstitutional on its face, but instead it urges that respondent's application of said Act to petitioner is unconstitutional. No doubt, therefore, arises as to the jurisdiction of the Division of Tax Appeals to determine the issue.

Appendix C

Respondent argues that the Corporation Business Tax Act (1945) by its terms and essential purposes is a tax imposed by the State of New Jersey upon corporations "for the privilege of having or exercising its corporate franchise in the State of New Jersey, or for the privilege of doing business, employing or owning capital or property or maintaining an office" in this State. Said tax, referred to generally as "a franchise tax" is "in lieu of all other state, county or local taxation upon or measured by intangible personal property used in business" by subject corporations. Therefore, said tax is not one imposed solely for the privilege of doing business and the payment of it is not a condition precedent to the doing of business by a corporation in this State. Consequently the imposition of that tax does not constitute an impermissible regulation or burden upon a corporation engaged in interstate commerce under the Commerce Clause of the Constitution of the United States.

Respondent further contends that the contracts and operations of petitioner in New Jersey are so extensive and substantial that, for the purposes of the Corporation Business Tax Act (1945), the petitioner may be deemed to be doing a taxable business in the State of New Jersey without regard to its relationship to its over-all interstate business.

Question

May the tax provided for under the Corporation Business Tax Act (1945) N.J.S.A. 54:10A-1 *et seq.* be constitutionally applied to petitioner?

Nature of the Tax

The section of the Corporation Business Tax Act (1945) which imposes the tax N.J.S.A. 54:10A-2 provides:

> "Every domestic or foreign corporation which is not hereinafter exempted shall pay an annual fran-

chise tax for the year one thousand nine hundred and forty-six and each year thereafter, as hereinafter provided, for the privilege of having or exercising its corporate franchise in this State, or for the privilege of doing business, employing or owning capital or property, or maintaining an office, in this State. And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act."

Throughout the other sections of the Act the tax is referred to as a franchise tax. The regulations promulgated by respondent also refer to the tax as a franchise tax. It has been so described in *Werner Machine Co.* v. *Director, Division of Taxation,* 17 N. J. 121 (1954) aff'd 350 U. S. 492, 76 S. Ct. 534, 100 L. Ed. 634 (1956); *United States Steel Corp.* v. *Director, Division of Taxation,* 38 N. J. 533 (1962) and *F. W. Woolworth Co.* v. *Director, Division of Taxation,* 45 N. J. 466 (1965). It can be conceded that petitioner's contention that the tax is a "bona fide franchise tax" is entirely correct and respondent so concedes. Respondent, however, points out that the label is not in itself meaningful. What is crucial is the nature of the franchise tax because franchise taxes *per se* are not proscribed by the Commerce Clause of the Federal Constitution when applied to those engaged in interstate commerce.

The most important indication of the nature of this franchise tax is found in the words of the statute itself. It is imposed "for the privilege of having *or* exercising its corporate franchise in this State, *or* for the privilege of doing business, employing *or* owning capital *or* property, *or* maintaining an office in this State.". The word "or" is emphasized to show clearly that the tax is imposed because of several alternative privileges. Further, it is imposed only

when at least one of these privileges is exercised by a taxpayer doing business in the corporate form.

A further aspect of the tax so imposed is that it is "in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act.".

The language of the provisions of the Corporation Business Tax Act (1955) clearly indicates that the tax imposed thereunder is not imposed solely upon the privilege of doing business in the state or the right to do business in the state.

DISCUSSION

Petitioner relies heavily upon the decision of the United States Supreme Court in the case of *Spector Motor Service v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951). Petitioner's method of operation of its business in New Jersey is almost identical to that of Spector Motor Service, Inc., in Connecticut. The tax levied by the State of Connecticut on Spector is as follows:

> "Sec. 418c. Imposition of tax. Every mutual savings bank, savings and loan association and building and loan association doing business in this state, and *every other corporation or association, carrying on business in this state which is required to report to the collector of internal revenue* for the district in which such corporation or association has its principal place of business for the purpose of assessment, collection and payment of an income tax (with exceptions not material here * * * *shall pay, annually, a tax or excise upon its franchise for the privilege of carrying on or doing business within the state,* such tax to be measured by the entire net income as herein defined received by such corpora-

tion or association from business transacted within the statee during the income year and to be assessed at the rate of two per cent; * * *." (Emphasis supplied.) Conn. Gen. Stat. Cum. Supp. 1935.

This section was amended in 1937 by inserting in the first italicized clause, after the words *"every other corporation or association carrying on,"* the words *"or having the right to carry on"*. Conn. Gen. Stat. Cum. Supp. 1939, § 354e. Our conclusion is the same as to the assessments levied before and those levied after the amendment.

The current revision of the statute, as subsequently amended, appears in Conn. Gen. Stat. 1949, §§ 1896-1921.

(The foregoing is the footnote including emphasizing to the Spector decision and, therefore, represents the tax statute as ruled upon by the U. S. Supreme Court in that case.)

A brief statement of the litigation leading up to the decision of the U. S. Supreme Court in this case is important to a clear understanding of this case. Spector first instituted an action in the District Court for the District of Connecticut. That Court took jurisdiction and held that the Act did not apply to Spector. On appeal to the Court of Appeals for the Second Circuit that Court in 139 F. 2nd 809 held that the tax did apply to Spector and was constitutional. The U. S. Supreme Court granted certiorari, but, after hearing, remanded the cause to the District Court with directions to retain the bill pending the determination of proceedings to be brought in the state court in conformity with the opinion rendered in 323 U. S. 102, 65 S. Ct. 159, 89 L. Ed. 101. In that opinion the court pointed out the numerous questions to be answered in determining whether

or not Connecticut properly and legally taxed Spector, noting that many of the questions should be first answered by the state courts. It then said:

> "We would not be called upon to decide any of these questions of constitutionality, with their varying degrees of difficulty, if, as the District Court held, the statute does not apply to one, like petitioner, not authorized to do intrastate business. Nor do they emerge until all other local Connecticut issues are decided against petitioner. But even if the statute hits aspects of an exclusively interstate business; it is for Connecticut to decide from what aspect of interstate business she seeks an exaction. It is for her to say what is the subject matter which she has sought to tax and what is the calculus of the tax she seeks. Every one of these questions must be answered before we reach the constitutional issues which divided the court below."

Pursuant to that remand Spector instituted an appropriate action in the state courts and the Supreme Court of Errors of the State of Connecticut held that "The tax is then a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign." It held that the tax applied to Spector.

The District Court enjoined the collection of the tax and the Circuit Court of Appeals again reversed. Thus the matter returned to the U. S. Supreme Court which held the tax to be invalid, saying:

> "The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise

of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. These taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the power of the State and nondiscriminatory."

Three Justices dissented and voted to affirm the judgment below. Justice Clark said:

"The Court assumes, and I think it has been clearly demonstrated, that the tax under challenge is non-discriminatory, fairly apportioned and not an undue burden on interstate commerce. Hence, if an appellant had been engaged in an iota of activity which the Court would be willing to call 'intrastate', Connecticut could have applied its tax to the company's interstate business in the precise form which it now seeks to employ—a tax on the privilege of doing business in Connecticut measured by the entire net income attributable to the State, even though derived from interstate commerce.

"But solely because Spector engages in what the Court calls 'exclusively interstate' business, a different standard is applied. The Court does not ask whether the State is merely asking interstate commerce to pay its way, or whether the State in fact provides protection and services for which such commerce may fairly be charged. Nor is the Court concerned whether the tax puts interstate business at a competitive disadvantage or is likely to do so.

> Instead the tax is declared invalid simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders. The Court concedes, or at least appears to concede, that if the Connecticut legislature or highest court had described the tax as one for the use of highways or in lieu of an ad valorum property tax, Spector would have to pay the same amount calculated in the same way, as is sought to be collected here. In acknowledging this, the Court's own opinion totally refutes its protestation that the standard employed to strike down Connecticut's tax is more than a matter of labels. * * *"

It is, of course, recognized that dissenting opinions are per se of small value in determining what the law is, but they often shed light on the subtle thinking of the court as revealed by the debate among the members of the court, particularly in a field of law such as taxation where the decisions of our highest court in the nation do not necessarily lead to enunciations of principles which are clear to the ordinary mind.

The Spector case was decided in 1951. In 1954 the United States Supreme Court in the case of *Railway Express Agency* v. *Commonwealth of Va.*, 347 U. S. 359, 74 S. Ct. 558, 98 L. Ed. 757 (1954) declared invalid a tax of that State imposed upon an express company engaged solely in interstate commerce because it analyzed the imposed tax to be a "privilege tax" violative of the Commerce Clause of the Federal Constitution. It held that the assessment was laid on Railway's "privilege of doing business" in Virginia. After determining the dollar effect of the tax levied upon Railway, the Court said:

> "We have sustained and would now sustain the power of a state to tax, without discrimination, all

property within its jurisdiction and to include in its assessments, or to assess separately the value added by the property's assemblage into a going business, even if that business be solely interstate commerce. *Cf. Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298, 32 S. Ct. 218, 56 L. Ed. 445; *Baker* v. *Druesedow*, 263 U. S. 137, 44 S. Ct. 40, 68 L. Ed. 212; *Adams Express Co.* v. *Ohio State Auditor*, 166 U. S. 185, 17 S. Ct. 604, 41 L. Ed. 965. The impact of the tax is thus upon the proportionate total worth of the property. But the tax in dispute here does not depend on owning any physical property, nor upon the value thereof, but would be levied on gross revenues even if the company found some way to dispense with all local physical property. The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated. But we have declined to regard mere gross receipts as a sound measure of going concern value in a practical world of commerce, where values depend on profitableness of a business, not merely its volume. *Cf. United States Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328-329, 38 S. Ct. 499, 501, 62 L. Ed. 1135."

Once again there was a strong dissent. This time by four Justices who contended that even using the principle of *Spector* the tax should be held to be valid.

Five years later the effort of Virginia to require Railway to bear some of the cost of a government which it enjoyed came before the United States Supreme Court in the case of *Railway Express Agency, Inc.* v. *Virginia*, 358 U. S. 434, 79 S. Ct. 411, 3 L. Ed. 2nd 450 (1959). In the period between the former case and the later case Virginia

had enacted an Act levying a "franchise tax" on express companies, measured by gross receipts from operations within Virginia, in lieu of all other property taxes on intangibles and rolling stock. This tax was held to be valid even though imposed upon a corporation exclusively engaged in interstate commerce. In distinguishing the new tax from the former tax the Court said:

> "First, let us clear away the dead underbrush of the old law. The new tax is not denominated a license tax laid on the 'privilege of doing business in Virginia'; nor is it 'in addition to the property tax' levied against appellant, nor a condition precedent to its engaging in interstate commerce in the Commonwealth. The General Assembly has made crystal-clear that the tax is now a franchise tax laid on the intangible property of appellant, and is levied 'in lieu of taxes upon all of its other intangible property and * * * rolling stock'. The measure of the tax is on gross receipts, fairly apportioned, and, as to appellant is laid only on those 'derived from the transportation within this State of express transported through, into, or out of this state'."

The Court stated the question to be answered as follows:

> "* * * Our sole question under the Commerce Clause is whether the tax in practical operation is on property or privilege."

In holding that the tax as levied was not violative of the Commerce Clause the Court said:

> "As we have pointed out, the statute levies a franchise tax in lieu of all taxes on '*other* intangible property' and rolling stock (Emphasis added by Court) this leaves no room for doubt that the Gen-

eral Assembly intended to levy a tax upon appellant's intangibles. Moreover, supporting this interpretation, both the State Commission and the Supreme Court of Appeals have construed it as a tax on appellant's intangible property and 'going concern' value. This trinity of agreement by three state agencies, though not conclusive, has great weight in our determination of the natural and reasonable effect of the statute."

The court then held that the tax was valid as a property tax. One Justice concurred without opinion, but Justice Brennan filed a concurring opinion in which he stated that he had some reservation that the tax could "fairly be thought of as property tax", but rather he thought "the more realistic way of viewing the tax and evaluating its constitutional validity is to take it as what it is in substance, a levy on gross receipts fairly apportionable to the taxing State." He further said:

"* * * This Court's decisions sustain the application of a fairly apportioned gross receipts tax to an interstate transportation company. *Canton R. Co.* v. *Rogan,* 340 U. S. 511, 515-516, 71 S. Ct. 447, 449, 95 L. Ed. 488; *Central Greyhound Lines, Inc. of New York* v. *Mealey,* 334 U. S. 653, 663-664, 68 S. Ct. 1260, 1266-1267, 92 L. Ed. 1633. Cf. *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, 256, 58 S. Ct. 546, 549, 82 L. Ed. 823. In my view, the most compelling reason for affirming the judgment of the Supreme Court of Appeals of Virginia is the application of these principles here."

Justice Harlan concurred with Justice Brennan with a short explanatory opinion.

Appendix C

On the same day that the U. S. Supreme Court decided the foregoing case it decided the cases of *N. W. States Portland Cement Co. v. State of Minnesota* and *Williams v. Stockham Valves and Fittings, Inc.*, 358 U. S. 450, 79 S. Ct. 357 in which it held that the net income from the interstate operations of a foreign corporation may be subjected to state taxation provided that the levy is not discriminatory and is properly apportioned to local activities within the taxing state forming sufficient nexus to support the same, and that the imposition of such tax did not violate the Commerce Clause or the Due Process Clause of the Federal Constitution.

There are a great many decisions of the United States Supreme Court dealing with the vexing and complicated question of the right of the states to tax foreign corporations engaged in interstate commerce. No case has been cited, nor has any case been discovered by us, which passes on the validity of a statute precisely the same as N.J.S.A. 54:10A-1 *et seq.* when applied to a corporation engaged "exclusively in interstate commerce". Certainly the tax here imposed on petitioner is unlike the tax imposed in the *Spector* case (*supra*) or in the first *Railway-Virginia* case (*supra*) or even the second *Railway-Virginia* case (*supra*). The income tax phase of the New Jersey Business Corporation Act is comparable to the tax sustained in the *Portland Cement Co.* case (*supra*).

Conclusion

Careful analysis of each of the foregoing cases and of all the cases cited therein together with the numerous cases cited by the parties herein has not led this Division to the conclusion that the tax imposed on petitioner herein is in violation of the Commerce Clause of the Constitution of the United States.

Appendix C

Petitioner contends that it is a "bona fide franchise tax" hence it must fall, but it is clear from the foregoing cases that that label in itself does not render the tax invalid under the Commerce Clause. On the other hand respondent argues that it is a tax imposed for the privilege of operating in New Jersey in the corporate form, but this is no different than the tax which was stricken in *Suector* (*supra*). Indeed, if respondent applied the statute solely on that incidence of taxation, it must fall.

Respondent obviously did not so apply the Statute. On the contrary it is apparent, and the facts make it abundantly clear, that petitioner employs capital, owns substantial property and maintains offices within this State; that it enjoys to a marked degree the varied services of this State; that as a result thereof its income from its interstate business is substantially increased and that although all its activities are related to and integrated with its interstate business, nevertheless, its business activities within New Jersey are such as to fairly require it to pay its just share of the cost of state government. Respondent evidently applied the statute to petitioner because of these aspects of its New Jersey operations.

This Division concludes from its study of the statutes and decisional law that a sovereign state may levy a tax, measured by the net worth and net income of a corporation, upon all corporations which engage in business within its borders and which employ capital and own property and maintain offices here, where such tax is in lieu of all other state, county or local taxation upon or measured by intangible personal property; provided such tax is nondiscriminatory, is fairly apportioned and does not impose an undue burden on interstate commerce.

We hold that respondent has properly applied the tax in question upon petitioner and since petitioner has not con-

tended that the tax is discriminatory or unfairly apportioned, we find that the tax as computed by respondent is non-discriminatory and fairly apportioned so as to require petitioner to pay only its fair and just share of the cost of the state government which it uses in a substantial manner for its financial benefit.

By this holding, we certainly do not imply that respondent can constitutionally impose this tax upon a corporation simply because it exercises its right to engage in interstate commerce in this State.

The action of respondent in imposing the tax in question is sustained.

Dated: December 20, 1965.

APPENDIX D

Petition of Appeal

Petitioner, Roadway Express, Inc., a corporation of the State of Delaware, having its principal office at 147 Park Street (P. O. Box 471), Akron 9, Ohio, says that:

1. Petitioner is a corporation duly organized in 1954 under the laws of the State of Delaware.

2. Petitioner is the successor in interest to Roadway Express, Inc., a corporation of the State of Ohio, to whose franchises and businesses it succeeded in 1954.

3. Petitioner is, and at all material times has been, a common carrier of general freight by motor vehicles, pursuant to Certificate of Convenience and Necessity No. MC 2202 to petitioner by the Interstate Commerce Commission of the United States Government.

4. Any and all business conducted by petitioner during the years 1946 to 1960, inclusive, was exclusively in interstate commerce.

5. Said Certificate No. MC 2202 restricts petitioner's business to interstate commerce. Petitioner has not been authorized by the State of New Jersey to do intrastate trucking and does not engage in it.

6. Petitioner does not, and during the years 1946 to 1960, inclusive, did not, engage in any hauls which both originate and terminate in the State of New Jersey.

7. Prior to 1958 petitioner owned a terminal in Hoboken, New Jersey. In the year 1958 petitioner sold its Hoboken terminal and acquired as owner a terminal in Kearny, New Jersey, which it has since used. Between 1953 and 1960

plaintiff used the terminal which it leased at Bound Brook, New Jersey. All of the aforesaid terminals were used exclusively in connection with petitioner's interstate activities.

8. By determination dated August 29, 1962, the Director of the Division of Taxation has assessed against petitioner the corporation franchise or business tax enacted in P. L. 1945, Chapter 62, R.S. 54:10A-1 et seq., for the years 1946 to 1960, inclusive.

9. Said determination is unlawful and erroneous for the following reasons:

(a) All of the business conducted by petitioner or its predecessor in the State of New Jersey is and at all times has been exclusively in interstate commerce.

(b) By virtue of the Commerce Clause of the Federal Constitution, Art. I, §8, Cl. 3, the State of New Jersey has no power to impose upon petitioner the said corporation business or franchise tax.

(c) The Director of the Division of Taxation lacks authority to impose upon or collect from petitioner the taxes as set forth in the aforesaid determination dated August 29, 1962.

10. Petitioner has paid, under protest, the aforesaid taxes unlawfully assessed against it by the Director of the Division of Taxation.

WHEREFORE, petitioner demands that:

A. The determination of the Director of the Division of Taxation, dated August 29, 1962, be set aside.

B. A decision be rendered that petitioner or its predecessor has been engaged solely in interstate commerce.

Appendix D

C. Petitioner is not liable for New Jersey corporation business or franchise taxes for the years 1946 to 1960, inclusive.

D. The taxes paid by petitioner, under protest, be returned to it, together with lawful interest.

McCarter & English,
Attorneys for Petitioner
11 Commerce Street
Newark 2, New Jersey
By: Nicholas Conover English
A Member of the Firm.

APPENDIX E

Stipulation of Facts

The petitioner, Roadway Express, Inc., and the defendant, Director of Division of Taxation, acting through their respective attorneys, have entered into the following stipulation of facts for purposes of the above entitled appeal. This stipulation is entered into without prejudice to the right of either party to object to the materiality of any facts stated herein or to offer additional evidence or testimony. In general, the nature of the business which petitioner has carried on in New Jersey has been the same for each year for the 1946-1960 period, although the volume and size of the operation have grown over the years. Unless the context specifically indicates otherwise, the following stipulations apply to the kinds of activities petitioner has carried on in New Jersey during each of the years in question.

1. Petitioner is a corporation duly organized in 1954 under the laws of the state of Delaware.

2. Petitioner is the successor in interest to Roadway Express, Inc., a corporation of the State of Ohio, to whose franchises, liabilities and businesses it succeeded in 1954 by a merger. The term "petitioner" as used in this stipulation will be deemed to apply to the predecessor corporation wherever the context so indicates.

Appendix E

3. Petitioner is, and at all material times, has been solely a common carrier of general freight by motor vehicle.

4. Since 1950 petitioner has been the holder of Certificate of Convenience and Necessity No. MC 2202 issued to it by the Interstate Commerce Commission of the United States Government pursuant to its application of January 28, 1936, under Part II of the Interstate Commerce Act, 49 U.S.C.A. §301 et seq. Said Certificate No. MC 2202 is hereby offered as Exhibit P-1.

5. Said Certificate of Convenience and Necessity No. MC 2202 authorizes petitioner to operate as a common carrier by motor vehicle over the routes indicated on a map hereby offered as Exhibit P-2.

6. Petitioner's total route mileage as of January 1, 1960, according to Exhibits P-1 and P-2, was 29,078 miles and its route mileage in New Jersey was 308 miles. Its total miles traveled in 1960 were 106,751,720 miles, of which 2,578,857 miles were traveled in New Jersey that year. These figures are for over-the-road vehicles and do not refer to mileage by pickup and delivery trucks within the state of New Jersey. The total miles traveled by pickup and delivery vehicles, over petitioner's entire system, average about 8% of over-the-road miles traveled.

7. Petitioner's total gross revenue in 1960 was $717,380,270.00. Its gross revenue for freight originating in New Jersey, as explained in paragraphs 9 and 10 below, and also for freight originating outside of New Jersey from

the New York metropolitan area, as covered by paragraph 15 below, was $5,728,214.00.

8. The freight which petitioner carries consists of general commodities except: Livestock, articles of unusual value, dangerous explosives, commodities in bulk; commodities requiring special equipment, and household goods other than those that are crated and boxed. The general nature of the shippers is industrial.

9. Petitioner carries freight from New Jersey to destinations outside the state. Freight originating in New Jersey is usually picked up by petitioner at the point of origin. On occasion freight may be received at petitioner's New Jersey terminals from shippers, cartage agents or other trucking companies.

10. Petitioner accepts freight originating in New Jersey in lots less than the capacity of a full over-the-road truck. An over-the-road truck is always a tractor-trailer. This freight is collected by petitioner in trucks owned or leased by it and operated by it.

11. After collecting less than truckload lots, petitioner ordinarily transfers such freight to other trucks owned by it for out of state shipment. The transfer is made at petitioner's terminal at Kearny, New Jersey, and consists of moving the freight from so-called "city trucks" (or pick-up and delivery trucks) to over-the-road trucks or trailers. In exceptional cases such freight is picked up directly in an over-the-road trailer and is carried to a destination outside of New Jersey without being transferred at the terminal. Freight is retained on the dock at petitioner's Kearny Terminal only for such time as may be required to facilitate loading.

12. Petitioner does not crate or otherwise prepare for shipment freight originating in New Jersey. Damaged crates or packages are usually repaired to prevent further damage in transit, but petitioner has no special facilities for this purpose.

13. Petitioner carries freight to New Jersey destinations from points outside of the state. The nature of the commodities and shippers is the same as described in paragraph 8 of this stipulation.

14. Petitioner accepts at places outside of New Jersey less than truckload shipments of freight destined for New Jersey. It delivers less than truckload shipments from its Kearny, New Jersey Terminal to addresses in New Jersey and in metropolitan New York. Ordinarily this freight is transferred at petitioner's Kearny Terminal dock from over-the-road vehicles to city trucks for delivery, although over-the-road vehicles occasionally consummate the delivery.

15. Petitioner's Kearny Terminal in New Jersey is not used for the shipment of freight which both originates and finally terminates wholly within the state of New Jersey. Much of the petitioner's freight handled at the Kearny terminal comes from the New York metropolitan area for destinations outside of New Jersey, or goes to the New York metropolitan area from origins outside of New Jersey.

16. In 1946 petitioner purchased land at Hoboken, New Jersey, on which it completed a terminal in April, 1947. This terminal was sold in October, 1959. Petitioner purchased land in Kearny, New Jersey, in July, 1956 upon which the construction of a new terminal was subsequently initiated with completion in early 1959. The Hoboken

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Terminal was located on a plot 200′ x 200′. The terminal consisted of an office building and dock facilities. The office building was one story in height. Its dimensions were 70′ x 30′, consisting of 2100 square feet. The dock was 50′ x 150′ and there was an addition of 50′ x 50′ for undercover spotting of trucks. The entire unit had 28 doors. This facility did not include a garage.

17. Petitioner's Kearny, New Jersey Terminal is built on a plot consisting of 12.944 acres. The terminal consists of a two-story office containing 7,338 square feet. The dock contains 41,377 square feet. It is one story in height, about 101′ wide and 409′ long. Also located on the plot in Kearny is a garage 60′ x 99′, one story in height, and containing 5,900 square feet.

18. From March, 1953 to April, 1961 petitioner leased a terminal at Bound Brook, New Jersey. The property consisted of a lot 150′ x 116′, on which was located a one-story office building 16′ x 20′. The property contained no dock space, no freight doors or other dock facilities, nor garage.

19. At no time has petitioner ever sublet any space in its Hoboken, Kearny or Bound Brook terminals.

20. Petitioner has never purchased motor vehicles in New Jersey, nor sold motor vehicles to purchasers in New Jersey at the end of their usefulness to petitioner.

21. Petitioner had no garage in New Jersey prior to 1959. Prior to 1959 the servicing, maintenance and repair of petitioner's vehicles was done by contract with local garages in the vicinity of Hoboken. Since 1959 petitioner has serviced and made repairs at the Kearny Terminal on its pickup and delivery vehicles operating in New Jersey.

The servicing consists of supplying oil, grease, fuel, and motor and body repairs. Major repairs, on pickup and delivery vehicles, such as engine overhaul, are made by the manufacturers' representatives who specialize in the work. Purchases for the garage at Kearny are made at petitioner's Home Office in Akron, Ohio and then shipped to Kearny from Akron inventory. Such purchases consist generally of tires, small parts, lubricants, tools and the like. Fuel stored on the premises at Kearny is bought from suppliers designated by, and at prices determined by, petitioner's Home Office in Akron, Ohio. Occasional purchases of other garage supplies at predetermined prices are made by the Kearny garage manager at local vendors named by petitioner's Director of Purchasing at its Home Office in Akron.

22. With respect to units of petitioner's over-the-road truck fleet which come to Kearny from cities outside of New Jersey, petitioner's garage at Kearny makes checks for road safety and makes such minor repairs, or adds oil, as may be indicated. Major emergency repairs to the motors of these trucks are made locally by manufacturers' representatives. All major work, except that of an emergency nature, is done at petitioner's garages in Akron and Cincinnati, Ohio, Winston-Salem, North Carolina, St. Louis, Missouri, and Dallas, Texas, where the over-the-road equipment is domiciled and garaged.

23. The number of trucks owned or leased by petitioner and permanently garaged in New Jersey is unknown for years prior to 1956. The number of trucks permanently garaged in New Jersey was: For 1956 it was 34; for 1957 it was 40; for 1958 it was 44; and for 1959 it was 61. These were all city, or pickup and delivery trucks, and all were registered in New Jersey.

24. At no time has petitioner rented motor vehicles owned by it, whether kept or garaged in New Jersey or elsewhere, to any other party for use in New Jersey.

25. Petitioner has regularly obtained New Jersey licenses or registrations for its city or pickup and delivery trucks which regularly operate out of its New Jersey terminals.

26. Petitioner's Kearny Terminal is managed by a terminal manager, who before July 17, 1960, reported to a district manager at Philadelphia. Since then the manager of petitioner's Kearny Terminal has reported to a district manager, whose office has been located at petitioner's New Jersey Terminal, and who is responsible for the operations of petitioner's other freight terminals at Philadelphia and at Laurel, Maryland. The district manager reports to a vice president of petitioner, who is located at Winston-Salem, North Carolina. None of petitioner's corporate officers is, or has ever been, located in New Jersey.

27. Petitioner's Bound Brook Terminal manager reported for himself and a dispatcher to the same district manager to whom the Kearny manager reported. For administrative purposes he was not under the jurisdiction and authority of the Kearny Terminal manager. Operationally, the Bound Brook Terminal was regarded as a substation of Kearny, because most of the over-the-road equipment was furnished through Kearny Terminal, and the Kearny Terminal also received less than truckload shipments from Bound Brook for consolidation with Kearny freight moving outbound. Freight to and from Bound Brook usually moved in truckload lots, and on outbound shipments was dispatched directly from Bound Brook without routing through Kearny.

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28. Generally speaking, the Hoboken Terminals had served the same freight handling functions as the Kearny Terminal, but had no garage.

29. For the year 1960 petitioner maintained at its Kearny Terminal one terminal manager, one assistant terminal manager, and one operation's supervisor. Under these supervisory employees worked one chief dispatcher, who was responsible for 5 other dispatchers, an office manager, who was responsible for office routine, a claim prevention supervisor and engineer, a sales manager and 5 salesmen, and 3 shift supervisors for the dock who, in turn, supervised 6 dock foremen, who were responsible for 55 dock employees. In addition to the above, in 1960 petitioner on the average employed 86 pickup and delivery truck drivers, 6 garage employees, and 48 clerical employees.

30. Payrolls for all permanent employees of petitioner at its Hoboken, Kearny and Bound Brook terminals were prepared by petitioner's Home Office in Akron, Ohio, from information supplied by the respective terminals.

31. All of petitioner's employees at its New Jersey terminals have been paid by petitioner's Home Office in Akron, Ohio by means of checks drawn on The Firestone Bank, Akron, Ohio.

32. Except during the year 1954, petitioner has maintained one bank account in a New Jersey bank, namely, the First National Bank of Jersey City. Cash receipts collected at the New Jersey terminals have been deposited in said New Jersey bank account. Funds from the New Jersey bank account may be withdrawn only by petitioner's Home Office in Akron, Ohio. There is no bank account in New Jersey subject to withdrawal by petitioner's New Jersey employees. Petitioner's New Jersey employees

make payment of local purchases by sight draft, which is accepted for payment by The Firestone Bank in Akron, Ohio, and which is reimbursed by petitioner on a regular and frequent basis. Drafts can be rejected by the Home Office at Akron, Ohio.

33. Petitioner's Kearny, New Jersey Terminal maintains a petty cash fund in the constant amount of $350.00. The fund is in the hands of the Kearny Terminal Manager who makes periodic disbursements. The fund is replenished by checks drawn on the Firestone Bank in Akron, Ohio, and the fun itself is controlled by Mr. G. W. Winters, who is Director of General Accounting, for the petitioner at its Home Office in Akron, Ohio.

34. Following is a list of the various kinds of clerks employed at petitioner's Kearny Terminal and their functions, as supervised by the Office Manager:

(a) Switchboard operators, city dispatchers, and city dispatch clerk receive telephone calls from customers and direct trucks to pick up freight.

(b) Tally clerks check freight off local city or pickup trucks to the platform, and into over-the-road trailers.

(c) Rating and billing clerks prepare and distribute freight bills, nine-part forms used in the various freight handling functions. The distribution includes forwarding all control copies to petitioner's General Accounting Department, Akron, Ohio.

(d) Manifest clerk writes a list of freight bills carried on each outbound over-the-road trailer.

(e) O.S. & D. (over, short and damaged) and Tracing clerks check to locate over, short or damaged freight, and to route it to a proper destination.

(f) Time clerk checks time cards of employees daily, and forwards them weekly to General Accounting Department, Akron, Ohio for use in preparation and disbursement of pay checks.

(g) Line haul (over-the-road) dispatch clerk prepares and issues line haul (over-the-road) drivers' trip instructions.

(h) Cashier checks out freight bills to driver on freight for local, inbound delivery at start of day, and checks in driver at end of day. About 17% of such deliveries are paid for in Kearny by the customer to the driver at the time of delivery, and such currency is turned over by the driver to the cashier. The cashier actually deposits the cash receipts in petitioner's New Jersey bank account in the First National Bank of Jersey City, and also prepares a cash report and a duplicate deposit slip which is forwarded daily to petitioner's General Accounting Department, Akron, Ohio.

35. During the years 1949 through 1958, petitioner did not advertise in newspapers or magazines in New Jersey. However, petitioner did maintain a listing in the Yellow Pages of the telephone book; it did employ salesmen in New Jersey, who kept customers aware of petitioner's services and did solicit business; and petitioner has distributed informational fliers and maps to shippers to acquaint them with petitioner's routes and services.

36. For a 10-year period, the New Jersey taxes paid by petitioner are as follows:

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New Jersey Taxes	*1951*	*1952*	*1953*	*1954*	*1955*
Real Estate	$6,668	$8,256	$4,973	$5,289	$5,192
*Vehicle Taxes	*177	*344	*229	*21	*
Fuel	1,866	1,884	1,346	86	120
Payroll	3,749	3,490	4,852	5,252	5,406
Other	120	614		877	1,864
	$12,580	$14,588	$11,400	$11,525	$12,582

	1956	*1957*	*1958*	*1959*	*1960*
Real Estate	$7,766	$5,444	$7,018	$43,024	$32,044
*Vehicle Taxes	2,631	3,054	5,850	10,824	13,473
Fuel	6,026	9,258	11,765	16,945	23,907
Payroll	7,844	8,335	9,879	14,169	18,448
Other	1,779	2,403	2,364	3,106	2,071
	$26,046	$30,494	$36,876	$88,068	$89,943

37. Petitioner has filed corporation franchise business tax returns, under protest, for the years 1949 to 1960. All figures shown on said returns are accepted as accurate, and there is no dispute as to the amount of the taxes, assuming liability is established, for the years in question. Petitioner has fully discharged its liability for taxes as shown on said returns. The said returns may be marked in evidence as exhibits.

38. Petitioner has never made an application for authorization to do business in New Jersey under the provisions

* Leased units. Licensing and fuel taxes paid by lessor and are not reflected here.

Appendix E

of Title 14, Chapter 15 of the Revised Statutes of New Jersey.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1225

ROADWAY EXPRESS, INC.,

Appellant,

vs.

DIRECTOR, DIVISION OF TAXATION,

Appellee.

Motion to Dismiss and/or Affirm

Pursuant to Rule 16(1)(b) and 16(1)(d) of this Court, the Attorney General of the State of New Jersey, on behalf of the State of New Jersey, and the Director of the New Jersey Division of Taxation, moves to dismiss this appeal and/or affirm the judgment below on the grounds that the questions presented are so unsubstantial as not to require further argument.

Opinions Below

The opinion of the New Jersey Supreme Court is officially reported at 50 N. J. 471, 236 A. 2d 577 (1967). The opinion and the judgment of the Court are included in the

Jurisdictional Statement as Appendix A and Appendix B, respectively. The opinion of the New Jersey Division of Tax Appeals, dated December 20, 1965, is set forth in the Jurisdictional Statement, at Appendix C.

Question Presented

Does the Commerce Clause of the Federal Constitution prohibit a fairly apportioned, non-discriminatory State tax, statutorily directed to the ownership and employment of property or the maintenance of an office in the taxing State, and in lieu of other local taxes which may be imposed on intangible personal property, from being levied upon a foreign corporation doing an interstate business in the taxing State.

Statement of the Case

A. Proceedings Below.

This litigation arose on Petition of Appeal to the New Jersey Division of Tax Appeals for review of a 1962 determination by the Director of the New Jersey Division of Taxation imposing corporate business taxes for the years 1946 to 1960 inclusive pursuant to N.J.S.A. 54:10A-1 *et seq.* Appellant resisted the assessment, contending that it was solely engaged in interstate commerce and that application of the taxing statute to it was proscribed by the Commerce Clause of the United States Constitution. The matter was submitted to the Division of Tax Appeals upon an agreed stipulation of facts. The taxpayer did not contend that the tax was discriminatory against interstate business or that it was an undue burden on interstate commerce. It did not assert that the New Jersey tax was unapportioned. It did not attack the amount of the taxes determined to be due by the Respondent.

On December 20, 1965, the Division of Tax Appeals, in a written decision, upheld the validity of the assessment. The appellant thereupon duly filed an appeal to the Appellate Division of the Superior Court of New Jersey. While pending unheard in the Appellate Division, the Supreme Court of New Jersey certified the controversy for its immediate review.

B. The Decision of the New Jersey Supreme Court.

On December 18, 1967, the Supreme Court affirmed the decision of the Division of Tax Appeals and upheld the assessments in question. In the course of its written opinion, the Court analyzed both the nature of the New Jersey Corporation Business Tax and its constitutional applicability to appellant.

The Supreme Court ascertained that the tax imposed by N.J.S.A. 54:10A-1, *et seq.* is an impost upon any one or a combination of a number of different privileges, the exercise of which involve a substantial relationship between the taxpayer and the State of New Jersey. After carefully considering and analyzing this Court's most recent decisions upholding, as constitutionally permissible, an apportioned and non-discriminatory tax on interstate business, the New Jersey Court also concluded that the New Jersey tax as applied to the portion of the appellant's interstate business localized in New Jersey was fully within the ambit of this constitutional authority.

A Notice of Appeal to the United States Supreme Court was filed by appellant in the New Jersey Supreme Court on February 19, 1968.

ARGUMENT

POINT I

The Judgment of the New Jersey Supreme Court comports with established constitutional principles.

A. The United States Supreme Court by amalgamating a series of decisions after *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951) developed a rule of constitutional propriety based upon the right of a state to tax interstate corporations as a means of establishing a *quid pro quo* for the protection and services afforded the enmeshed local incidents of corporate activity.

***1. The movement away from the formalism of Spector Motor Service* v. *O'Connor*.**

This Court in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (1951) passed upon the constitutional validity of a taxing statute of the State of Connecticut which imposed a tax, measured by allocated net income, on the franchise of domestic and foreign corporations solely for the privilege of carrying on business in the State.

The taxpayer in *Spector* conducted an exclusively interstate trucking business in Connecticut. The Connecticut tax was non-discriminatory as to interstate commerce; was not in lieu of an *ad valorem* property tax (at p. 607) and did not rest upon the use of highways by motor trucks (at p. 606). It was demarcated:

> "'. . . a tax or excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign'." (at p. 606).

It was made clear in this Court's opinion that in considering constitutional propriety

> "The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State." (at pp. 608-609).

Acting within the statutory import of the Connecticut law the imposition of the privilege tax was declared invalid.

In a progression of cases following *Spector* this Court answered a series of attacks on taxing statutes which sought to enlarge the constitutional ambit of that decision.

Initially, two cases, read in tandem, are significantly illustrative of the judicial development. *Railway Express Agency* v. *Virginia*, 347 U. S. 359 (1954) (*Railway Express I*) and *Railway Express Agency Inc.* v. *Virginia*, 358 U. S. 434 (1959) (*Railway Express II*) demonstrate the progression of approach over a five year span.

In *Railway Express I*, the Court struck down a Virginia tax statute applying only to express companies. Virginia's statute provided:

> ". . . that 'for the privilege of doing business in this State,' express companies shall pay 'in addition to . . . the property tax as herein provided' an 'annual license tax' upon gross receipts earned in the State 'on business passing through, into or out of this State.'" (at p. 362).

The taxpayer was a foreign corporation which under Virginia law could not exercise intrastate public service powers. Thus, the taxpayer was engaged solely in interstate business in Virginia.

The tax in dispute did not depend upon the ownership of any physical property, nor upon the value thereof, but was levied on gross receipts alone. This Court noted that:

> "The fact that its measure is gross revenue is consistent with a tax on the privilege of doing a volume of business which would yield that revenue, just as the Legislature indicated." (at p. 367).

In holding the Virginia tax invalid the reach of this Court's ruling in *Spector* was delineated.

> "It is enough to say that we recently have ruled [citing *Spector*] that local incidents such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax." (at p. 368).

Thereafter, Virginia amended its taxing law to provide in pertinent part that:

> "'[e]ach express company . . . shall . . . pay to the State a franchise tax which shall be in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock.'
>
> The franchise tax is measured by 'the gross receipts derived from operations within' Virginia which is deemed
>
> 'to be all receipts on business beginning and ending within this State and all receipts derived from the transportation within this State of ex-

press transported through, into, or out of this State.'" (*Railway Express II Railway* at p. 438).

Once again the Virginia law compelled consideration of the taxpayer as engaged solely in interstate business.

This time, in *Railway Express Agency* v. *Virginia*, 358 U. S. 434 (1959), the Virginia tax was sustained as applied to the taxpayer. While not mentioning *Spector* directly in connection with the substantive features of the tax, this Court did say that the:

> ". . . sole question under the Commerce Clause is whether the tax in practical operation is on property or on privilege." (at p. 439).

As noted by the Supreme Court of New Jersey, the two Railway Express cases

> ". . . demonstrate that while a state, under a literal view of the *Spector* thesis, may not impose a tax upon interstate commerce solely for the privilege of doing that business in a state, a franchise tax may be imposed thereupon if the incidence or basis is a privilege other than engaging in that business as such or when the levy is in lieu of other state taxes which could be validly imposed on exclusively interstate business." (Ab19a).

On the same day this Court rendered its decision in *Railway Express II*, it handed down its opinion in *Northwestern States Portland Cement Company* v. *Minnesota*, 358 U. S. 450 (1959). Two cases had been consolidated for decision. The first, *Northwestern Cement* concerned an annual tax of the State of Minnesota upon the taxable net income of

> ". . . 'domestic and foreign corporations . . . whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both.'" (at p. 453).

The second case, *Williams* v. *Stockham Valves and Fittings, Inc.* dealt with a tax of the State of Georgia levied upon net income

> ". . . 'received by every corporation, foreign or domestic, owning property or doing business in this State.' The Act defines the latter as including 'any activities or transactions' carried on within the State 'for the purpose of financial profit or gain' regardless of its connection with interstate commerce." (at pp. 456-457).

* * *

> "In neither of these cases was the taxpayer a domiciliary of the taxing State, incorporated or with its principal place of business there, though each carried on substantial local activities." (at p. 459).

Both the tax of Minnesota and the tax of Georgia were sustained.

The judicial authority to pursue this form of tax was given notwithstanding the long established

> ". . . doctrine that the Commerce Clause gives exclusive power to the Congress to regulate interstate commerce, and its failure to act on the subject in the area of taxation nevertheless requires that interstate commerce shall be free from any direct restrictions or impositions by the States." (at p. 458).

This doctrine was exemplified in part by a reading of *Spector* to the effect that

> ". . . a State may not lay a tax on the 'privilege' of engaging in interstate commerce. . . ." (at p. 458).

In categorizing and distinguishing the *Spector* hypothesis this Court said:

> "Any doubt as to the validity of our position here was entirely dispelled four years after *Beeler*, in a unanimous *per curiam* in *West Publishing Co.* v. *McColgan*, 328 U. S. 823, citing the four cases of *Beeler*, *U. S. Glue Co.*, both *supra*, *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245 (1928) and *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945)." (at p. 460).

Plaintiff, in the *West Publishing Co.* case, it was stated:

> "' . . . overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce, and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause.' " (at p. 461).

Northwestern Cement enunciates the shift from the rigid formalism of *Spector* into a practical working approach to the constitutional propriety of state taxation of interstate commerce. This movement is expressed by the statement of this Court that:

> "The taxes are not regulations in any sense of that term. Admittedly they do not discriminate against nor subject either corporation to an undue burden. While it is true that a State may not erect a wall around its borders preventing commerce an entry,

> it is axiomatic that the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the State. The levies are not privilege taxes based on the right to carry on business in the taxing State. The States are left to collect only throught ordinary means. The tax, therefore, is 'not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce'." (at pp. 461-462).

Answering the specific contention that a contrary result was dictated by the decision in *Spector* it was noted that there

> ". . . it was repeatedly emphasized that the tax was 'imposed upon the franchise of a foreign corporation for the privilege of doing business within the State . . . .' Thus, it was invalid under a long line of predecents, some of which we have mentioned. It was not a levy on net income but an excise or tax placed on the franchise of a foreign corporation engaged 'exclusively' in interstate operations. * * * In *Spector* the incidence was the privilege of doing business, and that avenue of approach had long been declared unavailable under the Commerce Clause. As was said in *Spector*, 'taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and [are] non-discriminatory'.
>
> * * *

> [T]he 'controlling question is whether the state has given anything for which it can ask return.' Since by the practical operation of [the] tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred . . .' it 'is free to pursue its own fiscal policies, unembarrassed by the Constitution . . .'." (at pp. 463, 464, 465)

General Motors Corp. v. *Washington*, 377 U. S. 436 (1964) decided the constitutional validity of a tax by the State of Washington imposed upon a foreign corporation's privilege of engaging in business activities within the State.

> "The tax is measured by the appellant's gross wholesale sales of motor vehicles, parts and accessories delivered in the State. Appellant claims that the tax is levied on unapportioned gross receipts from such sales and is therefore, a tax on the privilege of engaging in interstate commerce . . . ." (at pp. 437-438)

The Supreme Court of Washington upheld the tax on the ground that it bore a reasonable relationship to appellant's activities within the State. This court affirmed, concluding the tax was levied upon the incidents of a substantial local business in Washington and was constitutionally valid.

Once again there was enunciated the narrow operational sphere of *Spector*.

> "As was said in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, 609 (1951), '[t]he State is not precluded from imposing taxes upon other activities or aspects of this [interstate] business which, unlike the privilege of doing interstate business, are subject to the soverign power of the State.' This is

> exactly what Washington seeks to do here and we cannot say that appellant has shown that its activities within the State are not such incidents as the State can reach.
>
> • • •
>
> Thus, in the bundle of corporate activity, which is the test here, we see General Motors' activity so enmeshed in local connections that it voluntarily paid taxes on various of its operations but insists that it was not liable on others. Since General Motors elected to enter the State in this fashion, we cannot say that the Supreme Court of Washington erred in holding that these local incidents were sufficient to form the basis for the levy of a tax that would not run contrary to the Constitution." (at pp. 447, 448)

There is an obvious significance in the progression from *Spector* through *General Motors*. *Spector* continues to mandate against a state tax levied upon the privilege or right to carry on an interstate business in the taxing state. It does not, however, under the clearly enunciated policies of this Court, preclude the imposition of

> ". . . a fairly apportioned, non-discriminatory means of requiring such a corporation to pay its just share of the cost of state government upon which it necessarily relies and by which it is furnished protection and benefit." (Ab23a)

2. The broad ambit of permissible State taxation.

The declared limitations of *Spector* should not be permitted to overshadow the scope and breadth of State tax levies on interstate corporations sustained as constitutional by this Court. In support of the holding that interstate business must pay its own way, there have been approved property taxes

". . . on the instruments employed in commerce, Western Union Telegraph Co. v. Attorney General, 125 US 530, 31 L ed 790, 8 S Ct 961 (1888); on property devoted to interstate transportation fairly apportioned to its use within the State, Pullman's Palace Car Co. v. Pennsylvania, 141 US 18, 35 L ed 613, 11 S Ct 876 (1891); on profits derived from foreign or interstate commerce by way of a net income tax, William E. Peck & Co. v. Lowe, 247 US 165, 62 L ed 1049, 38 S Ct 432 (1918), and United States Glue Co. v. Oak Creek, 247 U. S. 321, 62 L ed 1135, 38 S Ct 499 (1918); by franchise taxes, measured by the net income of a commercially domiciled corporation from interstate commerce attributable to business done in the State and fairly apportioned, Underwood Typewriter Co. v. Chamberlain, 254 US 113, 65 L ed 165, 41 S Ct 45 (1920); by a franchise tax measured on a proportional formula on profits of a unitary business manufacturing and selling ale, 'the process of manufacturing resulting in no profits until it ends in sales,' Bass, Ratcliff & Gretton, Ltd., v. State Tax Comm'n, 266 US 271, 282, 69 L ed 282, 287, 45 S Ct 82 (1924); by a personal property tax by a domiciliary State on a fleet of airplanes whose home port was in the taxing State, despite the fact that personal property taxes were paid on part of the fleet in other States, Northwest Airlines, Inc., v. Minnesota, 322 US 292, 88 L ed 1283, 64 S Ct 950, 153 ALR 245 (1944); by a net income tax on revenues derived from interstate commerce where fairly apportioned to business activities within the State, Northwestern States Portland Cement Co. v. Minnesota, 358 US 450, 3 L ed 2d 421, 79 S Ct 357, 67 ALR 2d 1292 (1959); and by a franchise tax levied on an express company, in lieu of taxes upon intangi-

> bles or rolling stock, measured by gross receipts, fairly apoprtioned, and derived from transportation within the State, Railway Express Agency, Inc. v. Virginia, 358 US 434, 3 L ed 2d 450, 79 S Ct 411 (1959)." *General Motors, supra* at pp. 439, 440.

To this list must be added an unapportioned gross receipts tax the levy of which

> ". . . is so closely related to the local activities of the corporation as to form 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' " Id. at p. 448.

It is within this pattern of functionally permissible taxation that the Supreme Court of New Jersey has spoken in sustaining the New Jersey tax levied on appellant.

B. The decision of the Supreme Court of New Jersey follows the already developed pattern of judicial precedent.

1. The New Jersey tax is levied on a multiform basis and relates in its functional incidence to local corporate activity.

For the purpose of determining constitutional applicability the Supreme Court of New Jersey carefully examined the true nature of the New Jersey Corporation Franchise Tax and the detailed facts relating to the properties and activities of appellant within the State of New Jersey.

> "The basis of the tax is a broad one and is not, as the taxpayers contend, imposed merely or solely for the privilege of doing business in New Jersey. It is a state tax applying generally to all domestic and foreign corporations, except those exempted by N.J.S.A. 54:10A-3—primarily financial institutions

and certain public utilities taxed specially by other acts. It was certainly intended to reach foreign corporations doing an intrastate business, an interstate business, or both, as far as could constitutionally be done, and its disjunctive recital of the various privileges must be considered with the intended overall coverage in mind. It was enacted in 1945 (L. 1945, c. 162), before *Spector* (and not amended since as far as the basis of the tax is concerned) and during the period when the approach of the United States Supreme Court may be said to have been that of the so-called multiple taxation doctrine. * * * The privileges taxed, N.J.S.A. 54:10A-2, are stated, as we have indicated, in the alternative and are not confined, as was the Connecticut statute in *Spector,* to that 'of carrying on or doing business within the state'. (340 *U. S.*, at *p.* 603, *n.* 1, 71 *S. Ct.* 509, 95 *L. Ed.* 576). Thus the privilege taxed may also be either that of exercising its corporate franchise within the state, *or* of owning or employing capital or property in the state, *or* of maintaining an office in the state. The last two stated alternatives clearly point particularly to the nexus of local activity within the state of a nature and extent, as here, where it can realistically be said that state government substantially affords protection and gives benefits to the corporation's enterprise within the state.

"Perhaps even more significant is the express 'in lieu' feature of the tax—'And such franchise tax shall be in lieu of all other State, county or local taxation upon or measured by intangible personal property used in business by corporations liable to taxation under this act.'' N.J.S.A. 54:10A-2. (50 N. J. 471, 483, Ab12a-13a)

It concluded, upon the stated basis of the tax, that

> ". . . viewed in the light of our statutory provisions, we conclude that it is correct to say that the New Jersey corporate business tax, by reason of the alternative bases set forth in the act, is not imposed upon foreign corporations merely or solely for the privilege of doing interstate business in New Jersey. We think also there is no longer necessarily any conclusive magic in the denomination of a tax as a 'franchise' tax or by another label. We believe validity will now be judged, broadly speaking and in the absence of Congressional action, on whether it is a fairly apportioned, non-discriminatory means of requiring such a corporation to pay its just share of the cost of state government upon which it necessarily relies and by which it is furnished protection and benefit. We are of the opinion that the New Jersey tax meets that test as applied to the taxpayers here involved." (Id. at pp. 491, 492, Ab22a-23a).

* * *

> "More technicaly speaking, it is our view that the New Jersey tax is validly applicable to these taxpayers on the foundation of other bases expressed in the statute. The first is that the tax is expressly in lieu of 'all other State, county or local taxation upon or measured by intangible personal property' of a foreign corporation, which kind of a tax we conceive could be validly imposed on a corporate entity of another state conducting an exclusively interstate business here. We believe the tax is additionally sustainable as a levy 'for the privilege of . . . employing or owning capital or property, or maintaining an office, in this State', if not also 'for the privilege of . . . exercising its corporation franchise' here. N.J.

> S.A. 54:10A-2. We think such privileges are sufficiently different from that of 'doing' interstate business so that they are, in the sense stated in *Spector*, aspects of such business subject to the sovereign power of the state." (Id. at p. 492, Ab23a-24a).

The Court gave full effect to the constitutional significance of *Spector* garnered from an examination of the progression of decisions from *Spector* through *General Motors*.

2. *The constitutional restrictions of Spector are applicable to that aspect of the tax levied solely upon the privilege of carrying on an interstate business in New Jersey.*

The judgment opinion of the New Jersey Supreme Court fully accepted the constitutional prohibitions of *Spector* as interpreted by the United States Supreme Court.

> "It remains established that a tax on an exclusively interstate business verbally based solely on the privilege of doing such business in the state is constitutionally forbidden. * * * Since a state may not exclude such a corporation from doing such business within it, it may not exact an impose on the thesis of a condition of entry therein." (Id. at p. 492, Ab23a).

Accordingly, the Court construed

> ". . . that basis of New Jersey's tax to be inapplicable to taxpayers like those involved here." (Id. at p. 492, Ab23a).

In so doing the Court has continued the viability of *Spector* to the extent prescribed and limited by this Court.

3. *Appellant's corporate activity in New Jersey provides substantive support for the imposition of the New Jersey Franchise Tax.*

The activities of appellant within New Jersey came under careful scrutiny. Focusing upon them, it is quite clear that its interstate operations involved substantial continuous localized activity within the State of New Jersey. It owns and utilizes substantial properties and facilities in this State (Stipulation of Facts commencing at Ab50a, Paragraphs 11, 14, 15, 16, 17, 18, 19, 21 and 28.) It employs an extensive force of employees on a permanent and continuing basis in this State. (Stipulation of Facts Paragraphs 26, 27, 29 and 34.) It owns, maintains and operates on a permanent basis within the State of New Jersey numerous pick-up and delivery trucks which are licensed by the State and function only in the pick-up and delivery of merchandise between points wholly within the State. (Stipulation of Facts Paragraphs 10, 11, 14, 21, 22, 23 and 25.) It utilizes, systematically and regularly, sales personnel for the purpose of soliciting and handling local accounts and it engages in substantial advertising and promotional campaigns in the State encouraging the use of their respective services. (Stipulation of Facts Items 29 and 35.) Moreover, the appellant pays voluntarily other taxes to the State of New Jersey or its political subdivisions including local property taxes, improvement taxes, license fees and the like. (Stipulation of facts Items 23, 25 and 36.) In their totality this pattern discloses a "bundle of corporate activity . . . so enmeshed in local connections" as to provide a sound basis for taxation. These facts and others formed the basis for the finding of the New Jersey Supreme Court that there were sufficient aspects of local business to subject appellant to the sovereign power of the State.

"Quite apart from the intangible benefits all businesses receive by reason of the very existence of an orderly state government, a couple of specific things come to mind here as examples of particular benefit. The taxpayers' over-the-road vehicles, registered elsewhere and not paying any license fees to New Jersey, in traveling over two and a half million miles in a year on highways here, must have very considerably utilized toll-free roads constructed and maintained by the state as well as country roads built or improved by state aid distributions. The vehicles and their cargoes were protected by the law enforcement activities of the state police force. The use of the courts necessarily also involved utilization of facilities and services provided by state revenues." (50 N. J. at pp. 492-493, Ab24a).

In sum, the application of the New Jersey tax to appellant has been sustained by the New Jersey Supreme Court upon such bases as have already been constitutionally sanctioned by this Court.

POINT II

Appellant has presented no reasons why the Court should give further attention to this matter.

Appellant presents two arguments to support its contention that this matter requires full hearing by this Court. It argues that the action of the New Jersey Supreme Court has forced the conclusion ". . . that *Spector* is dead (Ab13). It also seeks to combine as indistinguishable the privilege or right of doing business with the actual performance of business activity within the taxing state. In the first of its propositions appellant is incorrect in its

reading of the opinion of the New Jersey Supreme Court. In the second, appellant is incorrect in its reading of the opinions of the Supreme Court of the United States.

If evidence is required of the continued viability of *Spector* within its presently delinated sphere, it may be found in the statement of the New Jersey Supreme Court that

> "It remains established that a tax on an exclusively interstate business verbally based solely on the privilege of doing such business in the state is constitutionally forbidden." (50 N. J. at p. 492, Ab23a).

This is the present substance of the holding in *Spector*. If further buttress of this position must be demonstrated it may be found in the New Jersey Court's statement:

> "We therefore construe that basis of New Jersey's tax to be inapplicable to taxpayers like those involved here." (Id. at p. 492, Ab23a).

It is true that the New Jersey Supreme Court indicated its conviction

> ". . . that the minority approach [in *Spector*] has since become the court's general view . . ." (Id. at p. 487, Ab17a).

Appellant apparently has not considered the remainder of the Court's sentence that

> ". . . the later decisions demonstrate the case remains authority . . . in the precise statutory situation there found."

There is a considerable difference between overruling a decision and pointing up a reading by this Court which has restricted that decision to its peculiar statutory facts.

Appellant's second argument confuses the privilege of doing business with the actual performance of business activity.

> "It is impossible to perceive how the privilege of exercising a corporate franchise can mean, in practical effect, anything different from a corporation's doing business. * * * It is equally difficult to perceive how a corporation can own capital or property without its doing business." (Ab9-10).

It is apparent from the foregoing quotation that 17 years of the judicial history of this Court have had no impact upon appellant's thinking. Appellant ignores the language of *Northwestern Cement,* quoting *Wisconsin* v. *J. C. Penney Co.* that where a state has exerted its power in relation to opportunities it has given, protection it has afforded and benefits it has conferred

> ". . . it 'is free to pursue its own fiscal policies, unembarrassed by the Constitution. . . .'" (at p. 465)

Appellant ignores the statement, again in *Northwestern Cement,* that

> ". . . the founders did not intend to immunize such commerce from carrying its fair share of the costs of the state government in return for the benefits it derives from within the state. *The levies are not privilege taxes based on the right to carry on business in the taxing state.*" (Emphasis added) (at pp. 461, 462).

Appellant ignores the question raised in *Railway Express II* as to

> ". . . whether the tax in practical operation is on property or on privilege." (at p. 435).

Appellant ignores the concept of

> ". . . the bundle of corporate activity . . . enmeshed in local connections . . . ." *Supra,* at p. 447.

In point of fact to give credence to appellant's argument is to expand the doctrine of *Spector* by ignoring history. One is tempted to point to the dialogue in the play "Inherit the Wind" between Henry Drummond and Matthew Harrison Brady:

Brady:

> "Why is it, my old friend, that you have moved so far away from me?"

Drummond:

> "All motion is relative. Perhaps it is *you* who have moved away—by standing still."

Lawrence and Lee, *Inherit The Wind* in Best American Plays Fourth Series at p. 421. (Crown Publishers, Inc. New York 1958).

CONCLUSION

The New Jersey Supreme Court has determined that the New Jersey Corporation Franchise Tax is constitutionally applicable to a foreign corporation doing an interstate business as a levy for the privilege of employing or owning capital or property, or maintaining an office in the taxing State, as well as by reason of its imposition in lieu of all other local taxation of intangible personal property. In so doing the New Jersey Court has followed and subscribed to the developed precedents of the United States Supreme Court. Appellant has raised no substantial or important federal constitutional question which warrants

the further attention of this Court and, therefore, it is respectfully urged that this appeal be dismissed and/or the judgment below be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

APR 16 1968

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 1225

ROADWAY EXPRESS, INC.,

Appellant,

vs.

DIRECTOR, DIVISION OF TAXATION,

Appellee.

On Appeal from the New Jersey Supreme Court

BRIEF OPPOSING MOTION TO DISMISS AND/OR AFFIRM

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ON APPEAL FROM THE NEW JERSEY SUPREME COURT

BRIEF OPPOSING MOTION TO DISMISS AND/OR AFFIRM

Appellee's motion to dismiss and/or affirm tacitly concedes that the instant appeal squarely falls within the scope of 28 U.S.C. Sec. 1257(2). The motion is grounded, however, on the proposition that the constitutional issues presented are so unsubstantial as not to require further argument. The motion is not well grounded. The questions are substantial and properly deserve the full consideration of this Court.

Appellee, in Point I of its brief, following the example of the learned court below, undertakes to analyze certain

decisions of this court in order to show that the Wave of the Future is to uphold this particular instance of state taxation notwithstanding the Commerce Clause, since interstate commerce must pay its own way. This technique is an old one, but it has proved unsuccessful enough times that it cannot safely be accepted as a method of demonstrating a lack of substance of the constitutional issues raised by this appeal.

The Second Circuit Court of Appeals in *Spector Motor Service* v. *Walsh*, 139 F. 2d 809, 814-818 (1944), and in *Spector Motor Service* v. *O'Connor*, 181 F. 2d 150, 153-156 (1950) upheld the constitutionality of the state corporate franchise tax by such a technique only to be ultimately reversed by this Court on appeal from the last cited opinion, at 340 U. S. 602 (1951).

The same method was employed by the state court in *Nippert* v. *City of Richmond*, 183 Va. 689, 33 S. E. 2d 206 (1945), only to be rejected by this Court in *Nippert* v. *Richmond*, 327 U. S. 416, 420-423 (1946), and in *Calvert* v. *Panhandle Eastern Pipeline Company*, 255 S. W. 2d 535 (Tex. Civil Appeals 1935), only to be reversed in *Michigan-Wisconsin Pipeline* v. *Calvert*, 347 U. S. 157 (1954).

Counsel's argument along similar lines was rejected by this Court in *Joseph* v. *Carter & Weekes*, 330 U. S. 422, 425-433 (1937).

In any event, the long standing rule that interstate commerce must pay its own way, *Postal Telegraph-Cable Company* v. *Richmond*, 249 U. S. 252, 259 (1919), does not mean that constitutional limitations are obsolete or that any and every form of state taxation on interstate commerce is permissible. Instead, this Court has carefully adhered to the view that the Commerce Clause, even today, forbids certain forms of state taxation, *Freeman* v. *Hewit*, 329 U. S. 249, 253 (1946); *National Bellas Hess* v. *Department of Revenue*, 386 U. S. 753 (1967).

Moreover, the cases in this Court relied upon by appellee, when properly analyzed, are distinguishable from the case at bar and do not support the conclusion that *Spector Motor Service* v. *O'Connor*, 340 U. S. 602, has been impliedly overruled, or that the imposition of the tax in question upon appellant is clearly free from constitutional doubts.

Spector, of course, held that the Commerce Clause forbids a state franchise tax upon the privilege of doing business, when levied upon a foreign corporation engaged solely in interstate commerce.

Railway Express Agency v. *Virginia*, 347 U. S. 359 (1954) held unconstitutional an annual license tax levied upon gross receipts, for the privilege of doing business in the state where the taxpayer was a foreign corporation engaged solely in interstate commerce.

Railway Express Agency v. *Virginia*, 358 U. S. 434 (1959) upheld as valid a "franchise" tax measured by gross receipts derived from operations within the state. It is important to note that this tax was sustained on the ground that it was not a franchise tax on the privilege of doing business within the state, but was a property tax. The opinion of the Supreme Court of Appeals of Virginia in this case, reported at 199 Va. 589, 100 S. E. 2d 785, makes it clear that the tax was a property tax and not an excise upon the privilege of doing business, 100 S. E. 2d 789-791, 795. The issue was stated in this Court's opinion at 358 U. S. 439, as follows: "Our sole question under the Commerce Clause is whether the tax in practical operation is on property or on privilege." The tax was upheld because it was concluded to be a tax on property; this was emphasized in the concurring opinion of Mr. Justice Brennan, 358 U. S. 446-448.

Northwestern Cement Company v. *Minnesota*, 358 U. S. 450 (1959) upheld the constitutionality of a state net income tax imposed upon that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing state when those activities are exclusively in furtherance of interstate commerce. The court's opinion distinguished the issues before it from other situations and expressly stated, at p. 548: "Moreover, it is beyond dispute that a state may not lay a tax on the 'privilege' of engaging in interstate commerce, *Spector Motor Service* v. *O'Gonnor*, 340 U. S. 602 (1951)." Certainly, the *Northwest Cement* case furnishes absolutely no basis for concluding that the *Spector* case is no longer authoritative.

General Motors Corp. v. *Washington*, 377 U. S. 436 (1964) did not deal with the imposition of a state franchise tax on a foreign corporation engaged *exclusively* in interstate commerce, but it involved such a tax upon a foreign corporation engaged partly in intrastate and partly in interstate commerce. Thus, this case is in the line of authority illustrated by such cases as *International Shoe Company* v. *Shartell*, 279 U. S. 429, 433 (1929) and *Southern Natural Gas Corp.* v. *Alabama*, 301 U. S. (1937). The particular significance of *General Motors Corp.* v. *Washngton* lies in its insistence that the taxpayer sustain the burden of proving the relative amount of intrastate as opposed to interstate commerce that it did within the taxing state; see 377 U. S. at 448, 449.

The New Jersey Supreme Court, in the opinion below, conceded that a franchise tax "on an exclusively interstate business based solely on the privilege of doing such business in the state is constitutionally forbidden." 50 N. J. 492, 236 A. 2d 588. This, of course, is the rule of *Spector*. The court concluded that the New Jersey tax, by virtue of

the statutory language employed, is imposed upon something other than "doing interstate business." It conceded, however, that this was a question never passed upon by this Court. Thus, the court below stated, at 50 N. J. 485, 236 A. 2d 584:

> "Constitutional propriety is not to be determined by labels or semantics, but rather by the operating incidence of the particular levy, while a tax basis worded as is New Jersey's has never been passed upon by the nation's highest court, we earnestly believe that the current course of its opinions in the field, as we read them, points to the conclusion that this levy is valid as applied to exclusively interstate business."

Surely a constitutional question, which has admittedly never been passed upon by this Court, presents a question of substance calling for the noting of probable jurisdiction.

Appellee's motion should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

ROADWAY EXPRESS, INC. *v.* DIRECTOR, DIVISION OF TAXATION.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 1225. Decided April 29, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that probable jurisdiction should be noted and the case set for oral argument.